TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 773.

SEABOARD AIR LINE RAILWAY, PLAINTIFF IN ERROR,

vs.

J. T. RENN.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED DECEMBER 30, 1915.

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1 Seventh District.

No. 259.

RENN
against
S. A. L. RY.

(From Wake.)

Before F. A. Daniels, J. Defendant Appealed.

Caption.

Be it remembered, that at a Superior Court begun, continued and held, in and for the County of Wake, State of North Carolina, at the court house in the city of Raleigh, on the *13th Monday in March*, 1915, it being the 31st day of May, 1915, before Honorable F. A. Daniels, Judge presiding, the following proceedings were had, to-wit:

Summons for Relief.

NORTH CAROLINA,
Wake County:

In the Superior Court.

J. T. RENN
against
SEABOARD AIR LINE RAILWAY.

State of North Carolina to the Sheriff of Wake County, Greeting:

You are hereby commanded to summon Seaboard Air Line Railway, the defendant above-named, if it be found within your county, to be and appear before the Judge of our Superior Court, at a court to be held for the County of Wake, at the court house in Raleigh, on the third Monday after the first Monday of March, 1913, it being the 24th day of March, 1913, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court
2 of said county within the first three days of said term; and let the said defendant take notice, that if it fail to answer the complaint within the time required by law, the plaintiff will apply to the Court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 14th day of March, 1913.

(Signed) MILLARD MIAL,
Clerk Superior Court.

Prosecution Bond.

We acknowledge ourselves bound unto Seaboard Air Line Railway, the defendant in this action, in the sum of two hundred dollars; to be void, however, if the plaintiff, J. T. Renn, shall pay *pay* to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 8th day of March, 1913.

(Signed)	J. T. RENN.	(SEAL.)
(Signed)	T. T. PEATROSS.	(SEAL.)
(Signed)	J. R. FEADY.	(SEAL.)

Return on Summons.

Received March 14, 1913; served March 14, 1913, by reading the within summons and delivering a copy of same to W. T. Huntley, Agent at Raleigh, N. C., for Seaboard Air Line Railway.

J. H. SEARS,
Sheriff Wake County.
By H. H. CROCKER, *D. S.*

And on the 26th day of March 1913, J. T. Renn, by his attorneys, R. N. Simms and J. C. L. Harris, comes and complains as follows:

3 *Complaint.*

NORTH CAROLINA,
Wake County:

Superior Court, March Term, 1913.

(Title of Cause.)

The plaintiff, for his complaint says:

1. That he is, and at the times hereinafter mentioned was, a resident of Wake County, North Carolina.

2. That the defendant is, and at the times hereinafter mentioned, was a corporation existing and doing business under the laws of the State of North Carolina, and was operating a line of railroad in the State of North Carolina and in the State of Virginia, and elsewhere.

3. That on the 14th day of January, 1912, the plaintiff was in the employment of the defendant and in the discharge of the duties of his said employment it became and was proper and necessary for the plaintiff to traverse a certain piece of ground beside the railroad track of the defendant and within its right of way at or near the station known as Cochran, Virginia, and to do so hurrierly in order to get aboard a train of cars then and there being operated by the defendant; that at the said time it was snowing and the ground had become and was covered and hidden by snow; that the defend-

ant had carelessly and negligently caused, permitted and allowed water to be poured or spilled upon the ground at said place and to become frozen, thereby covering the ground for a considerable space with a sheet of ice, and the defendant had negligently permitted and allowed the said ice to be and remain upon the said ground at the said place, and to become and be covered and hidden by the snow, and had thereby negligently caused a highly dangerous condition to exist and the said place and condition was highly dangerous and perilous and the defendant had negligently failed to warn the plaintiff in any manner of the existence of said danger; and on account of the negligence of the defendant in the particulars
4 aforesaid, the plaintiff, while proceeding along the said ground in the exercise of ordinary prudence and care and without notice, knowledge or information or warning of any kind of the existence of said danger, was caused to slip and fall heavily upon the ground, and thereby his collar and other bones were injured and dislocated, and he was bruised and wrenched and strained and sprained, and he was caused to suffer other serious, painful, dangerous and permanent injuries to the muscles, bones, nerves and ligaments of his body, head and extremities, and caused to suffer much pain and anguish of body and mind.

4. That on account of the negligence of the defendant as aforesaid, the plaintiff has been damaged in the sum of ten thousand ($10,000) dollars.

Wherefore, the plaintiff prays judgment that he recover of the defendant the sum of ten thousand dollars damages, and the costs of this action, and that he have such other relief as may be proper.

(Signed) R. N. SIMMS,
Attorney for Plaintiff.

NORTH CAROLINA,
Wake County:

J. T. Renn, being duly sworn, deposes and says that the foregoing complaint is true to his own knowledge, except as to matters stated upon information and belief, and that as to those matters he believes it to be true.

(Signed) J. T. RENN.

Subscribed and sworn to before me this 26th day of March, 1913.

(Signed) A. T. SNOW,
Notary Public.

My commission expires the 13th day of July, 1914.

And thereafter, on the 23rd day of April, 1913, the defendant, by its attorney, Murray Allen, comes and answers as follows:

5 *Answer.*

NORTH CAROLINA,
Wake County:

Superior Court, March Term, 1913.

(Title of Cause.)

The defendant, answering the complaint herein, says:

1. Section one is admitted.
2. Section two is admitted.
3. The allegations of section three are not true and are denied.
4. The allegations of section four are not true and are denied.

And for further defense the defendant says:

1. That if plaintiff was injured as alleged in the complaint, which is again denied, such injury was caused by his own negligence, in failing to exercise the care of a prudent man under the circumstances, and in hurriedy walking over snow and ice, and plaintiff's negligence is pleaded by the defendant as contributory negligence and set up in bar of plaintiff's right to recover in this action.

2. That if plaintiff was injured as alleged in the complaint, which is again denied, the risk of injury by falling on ice and snow on the ground was one of the risks ordinarily incident to the plaintiff's employment and he assumed the risk of injury therefrom, and the assumption of risk by the plaintiff is pleaded by the defendant in bar of his right to recover in this action.

3. That if plaintiff was injured as alleged in the complaint, which is again denied, the condition of the ground was fully known to the plaintiff and the danger incident thereto, if any, was known to and appreciated by the plaintiff and he assumed the risk incident thereto, and the assumption of risk by the plaintiff is pleaded by the defendant in bar of his right to recover in this action.

6 4. That if the plaintiff was injured, as alleged in the complaint, which is again denied, such injury was sustained in the State of Virginia, and plaintiff's right to recover on acocunt of said injury is goverened by the law of said State and under said law the plaintiff is not entitled to recover damages in this action because of his own negligence and carelessness in failing to exercise the care of a prudent person under the circumstances and in hurriedly walking over the snow and ice, and plaintiff's negligence is pleaded by the defendant as contributory negligence under the law of the State of Virginia, and is set up by the defendant in bar of plaintiff's right to recover in this action.

5. That under the law of the State of Virginia, if the plaintiff was injured as alleged in the complaint, which is again denied, the risk of injury by falling on ice and snow on the ground was one of the risks ordinarily incident to the plaintiff's employment, and he assumed the risk of injury therefrom, and the assumption of risk

by the plaintiff under the law of the State of Virginia is pleaded by the defendant in bar of plaintiff's right to recover in this action.

6. That if the plaintiff was injured, as alleged in the complaint, which is again denied, the condition of the ground was fully known to the plaintiff and the danger incident thereto, if any, was known to the plaintiff and appreciated by him, and under the law of the State of Virginia he assumed the risk incident thereto and the assumption of risk by the plaintiff under the law of the State of Virginia is pleaded by the defendant in bar of plaintiff's right to recover in this action.

7. That if plaintiff was injured as alleged, which is denied, the defendant pleads the law of the State of Virginia, as set forth in bar of plaintiff's right to recover.

Wherefore, defendant demands judgment that it go without day and recover the costs of this action.

(Signed) MURRAY ALLEN,
Defendant's Attorney.

7 NORTH CAROLINA,
Wake County:

J. F. Mitchell, being duly sworn, says: That he is agent for the defendant company at Raleigh, N. C., that the foregoing answer is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) J. F. MITCHELL.

Sworn to and subscribed before me this 21st day of April, 1913.
C. A. GOSNEY,
Notary Public.

My commission expires 29th day of Jan., 1914.

Upon this cause coming on for trial, at the conclusion of the plaintiff's evidence, the plaintiff was allowed by the court, over the defendant's objection and exception, to file the following amendment to his complaint:

Amendment to Complaint.

NORTH CAROLINA,
Wake County:

Superior Court, May Term, 1915.

(Title of Cause.)

The plaintiff, amending his complaint by leave of the Court adds thereto the following, to follow paragraph three, to-wit:

3A. That at the time the plaintiff suffered said injuries he was in the regular employment of the defendant as a pump repairer,

working as from time to time ordered by the defendant, on the pumps used in connection with the line of defendant's railroad extending between the city of Raleigh, in the State of North Carolina, and the city of Richmond, in the State of Virginia; and at the time the plaintiff suffered said injuries he had been sent by the de-
8 fendant from his home in Raleigh, North Carolina, to Cochran, Virginia, to repair a pump of the defendant at said Cochran, Virginia, and he had visited and inspected said pump and discovered the need of a coupling or fitting or flange or union, which was not obtainable at Cochran, Virginia, and which he thought (as afterwards proved true) the defendant had at Skelton, Virginia; and the plaintiff at the time of suffering said injuries was going along the usual path from said pump past the water tank of the defendant at Cochran, Virginia, to board, at Cochran, Virginia, one of defendant's trains and to go to said Skelton, Virginia, to get said needed part or appliance to be used by him in repairing a pipe connected with the said pump at Cochran, Va., which pump had theretofore been and was thereafter to be used by the defendant in pumping water into the said tank at Cochran, Virginia, from which tank water was from time to time taken by trains of the defendant, some of which trains were at such times being operated by defendant while engaged in interstate commerce, and that the train which the plaintiff was going to board and did board, was at said time engaged and operated by the defendant in interstate commerce; and that at said time the defendant was a railroad company engaged as a common carrier by railroad of freight and passengers in interstate commerce between the State of Virginia and the State of North Carolina.

(Signed) R. N. SIMMS,
(Signed) J. C. L. HARRIS,
Attorneys for Plaintiff.

NORTH CAROLINA,
Wake County:

J. T. Renn, being duly sworn, deposes and says, that the foregoing amendment to his complaint, and his complaint as thus amended, are true to his own knowledge, except as to matters therein stated upon information and belief, and that as to those matters he believes it to be true.

(Signed) J. T. RENN.

9 Subscribed and sworn to before me this 11th day of June, 1915.

(Signed) A .T. SHAW,
Notary Public.

My commission expires July 21, 1916.

The defendant thereupon, by leave of Court, filed the following written objections to the amendment to plaintiff's complaint:

Objections to Amended Complaint.

The defendant objects to the allowance of this amendment to the complaint upon the ground that it introduces a new cause of action, to-wit: A cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States, while he is employed by such carrier in such commerce, which cause of action arises under the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section six of the said Act of Congress, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said section 6 of the Act of Congress of April 22, 1908.

The defendant also objects to the allowance of the said amendment upon the ground that the court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. Objection overruled and defendant excepts.

The defendant also objects to said amendment upon the ground that it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend, and asks for a continuance if the amendment is allowed. Motion overruled, and defendant excepts.

The defendant filed the following answer to the amendment to plaintiff's complaint:

Answer to Amendment to Complaint.

NORTH CAROLINA,
Wake County:

Superior Court, May Term, 1915.

(Title of Cause.)

Reserving its objection and exception to the amendment of the complaint herein, the defendant answers said amendment as follows:

3A. The defendant denies that the plaintiff sustained any injury as alleged in the complaint and the amendment thereto, and denies that the plaintiff was going along the usual path from the defendant's pump past the water tank at Cochran, Va. The defendant admits

that at the time alleged the defendant was a common carrier by railroad of freight and passengers in interstate commerce between the States of Virginia and North Carolina and that the plaintiff was at the time alleged in the complaint employed by the defendant in such commerce.

And the defendant further alleges in answer to said amendment that the cause of action alleged in the complaint as amended arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and the plaintiff cannot maintain the said action because he did not commence it within two years
11 from the time the cause of action accrued, as required by Section 6 of the Act of Congress of the United States, of April 22, 1908, known as the Federal Employers' Liability Act, the alleged injury having occurred and the cause of action having accrued January 14, 1912, and the amendment to the complaint having been made June 11, 1915, and the defendant pleads the provisions of said Section 6 of the Act of Congress and the plaintiff's failure to commence his action for injuries received while the defendant was engaging in interstate commerce between the States of Virginia and North Carolina and while the plaintiff was employed by the defendant in such commerce, within two years from the time the said cause of action accrued, in bar of plaintiff's right to recover in this action.

(Signed) MURRAY ALLEN,
Attorney for Defendant.

Verification waived.

Trial, Jury, Etc.

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

And thereupon, this action coming on for trial, the following jurors are justified, tried and sworn to try the issues joined between the parties: W. O. Strother, E. J. Smith, H. P. Hobby, R. F. Frazier, C. M. Johnson, C. N. Dixon, D. H. Allen, S. G. Riggs, M. T. Ray, J. S. Moody, G. C. Jones, G. L. Sloan.

And thereupon, after the introduction of the evidence of the above plaintiff and defendant, and after the charge of the Court, said jurors heretofore empanelled in this case, for their verdict, found the issues submitted to them as follows:

12 *Issues—Verdict.*

NORTH CAROLINA,
Wake County:

Superior Court, June Term, 1915.

(Title of Cause.)

1. Was the plaintiff injured by the negligence of the defendant?
Answer: "Yes."
2. Did the plaintiff assume the risk of injury?
Answer: "No."
3. Did the plaintiff, by his own negligence, contribute to his injury?
Answer: "No."
4. What damages, if any, is plaintiff entitled to recover?
Answer: "$3,500."
5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and was the plaintiff employed by the defendant in such commerce?
Answer: "Yes."
6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed?
Answer: "No."

Motion to Set Verdict Aside, etc.

Upon the coming in of the verdict defendant moved for judgment non obstanti veredicto. Motion overruled. Defendant excepts.

Defendant moves to set the verdict aside because the amount of damages awarded is excessive. Motion overruled. Defendant excepts.

Defendant moves to set verdict aside as against the weight of evidence. Motion overruled. Defendant excepts.

Defendant moves for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence
13 and in the Court's charge to the jury, and in the Court's refusal to give defendant's requests for instruction, and in permitting plaintiff to amend his complaint so as to bring his cause of action within the provisions of the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and in refusing defendant's motions for judgment of nonsuit and to dismiss the action. Motion overruled. Defendant excepts.

Judgment.

NORTH CAROLINA,
Wake County:

Superior Court, May *31* Term, 1915.

(Title of Cause.)

The above-entitled action coming on for a hearing and being heard before his Honor, F. A. Daniels, Judge, and a jury, and the following issues having been submitted to the jury and answered by the jury as follows, to-wit:

1. Was the plaintiff injured by the negligence of the defendant?
Answer. "Yes."
2. Did the plaintiff assume the risk of injury?
Answer. "No."
3. Did the plaintiff, by his own negligence, contribute to his injury?
Answer. "No."
4. What damages, if any, is plaintiff entitled to recover?
Answer. "$3,500."
5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and was the plaintiff employed by the defendant in such commerce?
Answer. "Yes."
6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed?
Answer. "No."

14 Hereupon, it is by the Court, considered, ordered, adjudged and decreed, that the plaintiff, J. T. Renn, recover of the defendant, Seaboard Air Line Railway, the sum of three thousand five hundred ($3,500) dollars, with interest thereon from the 31st day of May, 1915, until paid, together with the costs of this action, including the special allowance to physicians, to be taxed by the Clerk.

(Signed) F. A. DANIELS,
Judge Presiding.

(Signed) R. N. SIMMS,
(Signed) J. C. L. HARRIS,
Attorneys for Plaintiff.

To the judgment signed by the Court defendant excepts. Defendant in open court appeals to the Supreme Court.

Notice of appeal given in open court, and further notice waived. Undertaking on appeal fixed in the sum of $50.

By consent, defendant is allowed until August 10, 1915, to file and serve statement of case on appeal and plaintiff is allowed until September 20, 1915, to serve counter-statement or exceptions.

The defendant thereupon filed the following appeal bond:

Appeal Bond.

NORTH CAROLINA,
Wake County:

Superior Court, June Term, 1915.

(Title of Cause.)

Whereas, at June Term, 1915, *at* the Superior Court of Wake County, judgment was rendered against defendant in the above-entitled action, in the sum of $3,500 and costs; and,

Whereas defendant intends to appeal to the Supreme Court:

15 Now, therefore, we, Seaboard Air Line Railway, and Fidelity and Deposit Company of Maryland, undertake, pursuant to the statute, that the defendant shall pay all costs which may be awarded against defendant in such appeal, not exceeding, however, the sum of $50.

SEABOARD AIR LINE RAILWAY,
[SEAL.] By MURRAY ALLEN.
FIDELITY & DEPOSIT CO. OF MARYLAND,
[SEAL.] By JOS. B. CHESHIRE, *Attorney in Fact,*
By J. McKIMMON, *Agent.*

Defendant's Statement of Case on Appeal.

NORTH CAROLINA,
Wake County:

Superior Court, June Term, 1915.

(Title of Cause.)

This is a civil action for damages brought by the plaintiff to recover for personal injuries alleged to have been sustained by plaintiff while employed by the defendant. The action was tried at June Term, 1915, of the Superior Court of Wake County before his Honor, F. A. Daniels, and a jury. The pleadings which appear in the record show the contentions of the parties. The issues with the answers made thereto by the jury and the judgment rendered upon the verdict appear in the record.

Plaintiff offered the following evidence:

J. T. RENN, the plaintiff in this action, having been duly sworn, deposes and says:

Direct examination by Mr. Simms:

My name is J. T. Renn. Before I start, will say I am deaf; I cannot hear. My home is in Raleigh, and have lived here since

1902, and have lived in this State all my life. Was born on
16 the 15th day of May, 1855. Commenced working for the Seaboard Air Line Railway on the 1st day of January, 1902. Never worked for them before. Worked for them from 1902 until the 28th day of February, 1913. My job was pump repairer. Started at $75 a month and ended at $90. Was receiving $90 a month at the time I got hurt, regularly every month. I suffered an injury in January, 1912, I believe the date is. I fell on the ice on the 14th day of January, 1912, at Cochran, Va. The reason I was there, I was ordered there by Mr. Elmore, the division engineer, to make repairs to the pump pipe, was the way the message read. Of course, it was the suction pipe, a flange union of the suction pipe had froze and burst, and, of course, they could not get water. Mr. Elmore had charge of me as a superior officer, and I went in pursuance to his orders. I was in Raleigh when I received orders to go, and I went and got to Cochran; I do not know really the time, but it was dark, I know, something I reckon about 7:30 or probably 8:00 o'clock, the train was late. The weather was awfully cold, the coldest night I ever saw, and snowing. Don't know how long it had been snowing, the snow was on the ground two or three days before that, and it started snowing again; it had held up but started again that evening. When I got to Cochran, I got off the train on the west side when they stopped at the tank. I went around the engine and down to the pump, the tank was on the east side of the train; I went around the head of the engine and went down to the pump, about 200 yards. Mr. Parks was there and Mr. Lewis. That Mr. Parks there, who was just sworn as a witness, and Mr. W. H. Lewis, who was pumper of the Seaboard at that time, and lived at Cochran at that time. He now lives in Petersburg, Va. I went down and saw the trouble, and saw that the flange union was burst, and there was no way to make the repairs, and I thought for a minute, and thought of having a 4-inch flange union at the pump at
Skelton; in other words, it is called Taylor's Creek. It is
17 10 or 12 miles this side of Cochran; and then I remarked I would have to wait until train 35 next morning, and Mr. Lewis said if you hurry up you can get that work train that is ordered in from Mr. Bishop's wreck. Mr. Bishop was not killed, he was badly hurt, the wreck turned over. I hurried back up there knowing if the train would stop at Skelton I could get that flange union and get back on some night train and make the repairs and avoid tying up the road for water, and I went up to get on the train, and Mr. Lewis was just ahead of me with a lantern; and then Mr. Parks was just behind me, a little piece, and as we went up the train had gone, train 66, the train I got there on was gone, and I went around to use the walk way between the tank and the toolhouse or carhouse, to use the walk way, and there was ice on the ground and I did not know it, and it was covered with snow; and, of course, I could not tell there was any ice there, and I was not warned of it, and about the time I got up close to the train, as far as across the street rather, then engineer moved ahead, coming towards Norlina, and then I hurried up, I was not running, but in a good fast

walk, and just as I went up on the slope of the bed of the road, my feet slipped from under me and my shoulder struck either the tie or the rail, I am not positive which, my right shoulder. I did not know the ice was there. Had not seen it at any time, and had no knowledge or information that it was there. Do not know of my own knowledge how it got there.

At the place I slipped, when my feet slipped, I was walking in the usual path from the pump to the train.

Yes; that was the path usually used by the people going from the toolhouse to the train. With respect to whether I was walking with care or otherwise, will say that I got Mr. Lewis ahead of me with the lantern so I could see, and we were all hurrying, we were not running, and about the time I went up on the ice, the train moved off.

As a fact, the train was not moving at the time, but I heard
18 the cars bumping together like they were going to leave, and I started to go across the place and fell.

Q. Did you ca[illegible] your own fall in any way?

Objection by Mr. Allen for the defendant. Objection overruled; defendant excepts.

Exception No. 1.

A. No, I did not. I was just as careful walking as I could be.

Mr. Lewis, the pumper, was just in front of me. He had the lantern, which was lit and shining. Mr. Parks was behind me. At the place I fell—this path I spoke of came around 40 feet probably from the railroad track, back of the tank, but where I fell it was where it came up and crossed the track. At the place I fell—the path on which I was walking, crosses the railroad track. When I fell, I suppose my feet were not over 4 or 5 feet from the ends of the ties. I guess it was something like 15 feet or 20 from the water tank. That was on the right of way of the Seaboard, and was the Seaboard's water tank and used by them. The man who operated the tank to fill it was Mr. W. H. Lewis, the gentleman who was in front of me with the lantern; Mr. Parks was behind me. I cannot say how thick or deep the snow was. I do not suppose it was much thicker than a newspaper, on the ice. It was very thin on the ice. I could not see the ice at all. It was covered with snow. When I fell, I think I dislocated my hip, or thought so at that time, or broke my hip and my shoulder. My hip was just as bad and give me as much misery for 2 or 3 days as my shoulder, but my shoulder was the place that lasted. My hip was not hit much when I fell. I said, I have broke my shoulder, and Mr. Parks said, did it hurt you much? and I said, Mr. Parks, take care of my coat, I will be back sometime tonight. I had my overcoat like this, and he said, I will
19 take care of it, and he went and threw it on the car when I got in. Mr. Carey Maynard took hold of me and helped me on the train. Nobody else there; Mr. Parks took hold of my arm and helped me up. Mr. Watkins was there, but I did not see him until I got on the car. I saw him after I got on the car. We went from there to the station, I forget the name, the one betwen Skelton,

the next station, and Mr. Maynard had to pick up a car there with his wrecking train and put it on the center, or something, had to get it on the track, and I got off and went down and asked the engineer if he would stop at the pump at Skelton and let me get the 4-inch flange, and he said he would stop anyway for water, and I said, if you will stop long enough for me to get it, there is no all night office, I will get it and will go to Norlina, and he done so, and we stopped at Skelton, and we got the flange, and Mr. Maynard helped me to get it, and I went down and showed him and he got the flange. Then we got on the train and went to Norlina, and I waited in the waiting room until 84 run, which was something like 2:00 o'clock in the morning; and, anyway, I got back to Cochran before day and went down and carried the flange and there was not anybody there, and I walked back to Mr. Lewis', about half a mile, and got him up and got to the fire and got our breakfast, and went down and made the repairs before train 35 the next day. As to the condition of my arm, shoulder and hip, had to tote it in a sling; I had nothing to make a sling and had to unbutton my shirt. Could not use it at all. I certainly did suffer pain; I suffered death time after time, and continue to suffer until right now. Never have gotten over the injury. Never have gotten back the use of my right arm like I had it. I cannot use it for nothing. I cannot tote it five hours down like that—so. The pain now is in my shoulder and collar bone. I kept on trying to work after that. I could not get anybody to relieve me, and I had to stay on the job all of the time. I asked for relief the next morning. I had a message written at Norlina by a man named Darnell and left there. I got Mr. Manning, baggage master on train 41 that day, to write a message and put it off at Ridgeway, to send a man to relieve me so I could go to the hospital. They never did send any such relief man. I was not able to work with my right arm. Everything I done I had to do with my left hand. I continued in their employment from the time I got hurt until the 28th of February, 1913, the last day of February, 1913. I have never been able since the time I got hurt in January, 1912, to work with my right arm. I have suffered expense on account of this injury and had to spend money. Don't know how much, never kept an account, but I bought every kind of liniment or everything that could be bought to wrap my shoulder with, and I tried several times to get laudanum, I thought it would ease me, and I went to Portsmouth and got it; I went there and bought a pint of laudanum and wrapped my shoulder with it, but nothing gave me any relief. I cannot tell you how much money I spent. I have no idea, but I suppose $25 or $30, at least as much as that. Have not been able to work since that time; not physically able to work with my hand. All of the work I have done since that time is job with the city, that they gave me laying a water main on Blount street as foreman. Did not have to use my arm in that work, nothing but a foreman. I finished that job. Have not had other employment. Have not been able to get it. Have tried to work, tried to do a little plumbing work, but I had my boy to help me. Could not work with my right arm or hand. I did get a job

with the Norfolk-Southern, running the coal chute down there, but I handled the engine altogether with my left hand. There was nothing to do but handle the reverse lever and throttle. I went along with that job until a man came along and took it for nothing. I was not discharged. I was getting $65 and another man came along and took it for $40 or $45. I have suffered distress, anxiety and worry of mind about myself and my condition. As to my
21 nervous system, I have been awfully nervous, gentlemen, and my hearing is failing of me, and my mind is failing of me, and I am not physically able to work at all more than what I am able to do with my left hand. My hip troubled me I guess something like 6 or 8 weeks before it got all right so I could walk good. Of course, I had to keep going, and, of course, I was a'hopping. It gave me much pain at first. As to whether I had ever seen any ice at the place or this ice at this time, I don't remember ever seeing any ice there. I had seen snow on the ground, but no ice.

Q. State whether if the tank had been operated in the usual way, there would have been ice there at that time?

Objection by Mr. Allen for the defendant. Objection overruled; defendant excepts.

Exception No. 2.

By the Court:

Q. Do you know how the tank was operating, had you known it before?

A. Well, no; there had been some ice in front of the tank between the tank and the main line by getting water and the waste from the pipe, but there should not have been any ice along where I was.

Objection by Mr. Allen for the defendant to this answer. Objection overruled; defendant excepts.

Exception No. 3.

I do not know really whether the ice came from the tank, but there was not ice anywhere else. I had seen the tank before on many occasions, several times, had been seeing it for several years. Had seen it in winter time and in cold weather.

Q. Had you ever seen, or did you ever see any ice at the place where you fell before?

22 Objection by Mr. Allen for the defendant. Objection overruled; defendant excepts.

Exception No. 4.

A. No. Never had seen any ice there before.

Cross-examination.

By Mr. Allen:

I was living at Raleigh at this time; my family was here and I made Raleigh my headquarters, and little later on Norlina became my headquarters; moved there in June, 1913. I was known as the pump repairer and tank man on the first division as they called it then, and the first division extends from Raleigh to Richmond and

Portsmouth, and also to Lewiston. I had under my care and charge all of the tanks and pumps between Raleigh and Richmond and Portsmouth, and all branch roads. I would go from one to another in the performance of my duties, keeping them in shape so that water would go from the pump to the tank and could be taken by the engines, and at various points and at Cochran engines stop and take water; the engines of trains that pass up the road going to Richmond and those coming south, both freight and passenger trains, some go by and some do not. I do not know about all of the freight trains from Norlina to Richmond or from Raleigh to Richmond stopping there and taking water; some of them did. Any train that wanted to take water, took water at that time. It was there for water service on the Seaboard, and all trains that wanted water stopped there and got it. As to whether any train on the Seaboard could stop there and get water—I know that was what they put the tank there for. I was not there all of the time to keep it in order so that the trains could get water; I was only there when I was called. I was not there to see that they could get water, I was there to see about the pump. The pump sent the water to the tank and the engine took water from the tank. I went there on this occasion to
23 fix the pump. Went from Raleigh. The train that I came away from there on, was on the sidetrack coming to Raleigh from the wreck. It was so cold Mr. Bissett, the master mechanic, ordered it in until the weather moderated. It was so cold that they could not work. All of the pumps between Raleigh and Richmond and Raleigh and Portsmouth were under my charge. They pumped water into the tanks, and from these tanks the trains of the Seaboard Air Line took water; that is what they were for. I do not know whether all of the trains of the Seaboard took water there—they all had to take water somewhere. Leaving Raleigh and going to Richmond and Portsmouth, the engines would have to take water; the engines of the trains leaving Raleigh for Richmond and Portsmouth would have to take water from one of these tanks under my charge, freight and passenger trains, and it was my duty to keep these pumps in working order so that they would keep the tanks full to serve these engines running from Raleigh to Richmond and Portsmouth. That is what I was doing at Cochran, working on the pump. All I had to do was to keep them in order to keep the tanks full so that the engines passing by that station, engines from Raleigh to Richmond, could get water. The engines ran from Raleigh to Richmond. I continued to work for the Seaboard for thirteen months after I got hurt. Each month I got my full pay—$90 a month, from the time I got hurt in January until February 28, 1913. My connection with the Seaboard terminated February 28, 1913, when they discharged me. That's when I left the service. In a few days after February, 1913, I went to see a lawyer about this suit. I went right straight to a lawyer and employed him to bring suit against the Seaboard. The suit was brought on March 8, 1913. That is the date I signed the bond. I do not know when the summons was issued. I don't know really whether it was soon after I signed this

bond. I declare I don't remember whether the suit was
24 brought in March after I signed the bond. I know I asked
them several times for jobs. I do not know when the suit
was brought. Don't remember whether it was brought during the
month of March, 1913. After leaving the employment of the Sea-
board, I worked for the city awhile. They paid me $2.50 a day.
Worked for them laying pipes for the water department. I have
a plumbing license and work as a plumber. I did some work on a
building down by the depot that belongs to Dr. Rogers, put the
plumbing in there. I left the employment of the city voluntarily,
got through the job. Did not quit; I ran the pipe—the water main,
from the city water works up Blount street over to Halifax, and then
they told me it was done. I kept the job as long as it lasted, and
then went to work for the Norfolk-Southern. Did not leave them of
my own accord; they hired a man named Blackwood to take the job;
they reduced the wages, and they told me that I could stay on if I
would work for the wages that his man took it for, and I left because
I could not work at it. I did not apply to the city for a job as pipe-
man and find that Mr. Clark Farmer had the job; I went to a man
by the name of Robertson and asked him for a job; he was working
for the city, and he said he had a foreman. As to whether the Sea-
board Air Line, after this injury, paid me $1,020 for services, after
I fell at Cochran, 13 months at $90 a month, they kept me employed.
I did not say nothing about pay, they kept me going all of the time,
and, of course, I expected it. They sent me my check all of the time.
When I got off the train at Cochran I went around to the pump,
went on the west side and around the head of the engine and down
to the pump. There was snow on the ground—all the way down to
the pump. Pond at the pump was frozen over, 14 inches of ice.
We had two colored men to cut a ditch and lay the pipe down. They
stayed there and cut the ditch. I was something like 20 feet or prob-
ably 25 feet, I do not know, to the tank when I fell. I fell, you
might say, on the south side of the tank; I fell on the east
25 side. Here is the tank and the track runs this way, and I
fell here. (Illustrates.) I was towards the station, near the
car house. I had not gotten beyond the tank, I was about 15 or 20
feet from the tank, in the usual pathway. There is a path that runs
from the tank to the pump house on the east side. I came along
parallel with the track, and then came right square up to the track
when I fell. When I got just by the tank I fell. I did not come by
the cross ties on the right of way. The tank was between me and the
cross ties. The tank was on the right of way and I was beyond the
tank. I came by the back of the tank. I did not go around the tool
house; I was between the tank and the tool house. I came up there
to cross over the track. There is a path that comes up from the
pump to the tank on the east side, which comes up to the side of the
tank towards Richmond. I came up on the walkway going south,
looking from the pump, and I came around back of the tank, and
went to cross right on the usual walkway when I fell. I had come
up on the right of way, about 15 or 20 feet from the tank. These
tanks should be kept full of water, and the engines take water from

them. They pull the tank spout down and then pull a chain and let the water into the engine. When the tank gets a little more than full, the water comes out over the tender and overflows on the ground; that is carelessness of the fireman; should not do that. There is air in the tank, but if a man is on his job, he does not have to lose any water. The goose neck is called the tank spout. He lets the tank spout down into the manhole, and when he turns it loose, ordinarily there is water in it, sometimes not, if he takes it up right quick. You find water around the water tanks, but it is on account of the carelessness of the firemen. You find it, I do not know about a plenty of it. I have been to tanks and found water around them, and that is a common thing, but it is not necessary that it should be there, but I have seen it there. In cold weather that water freezes like any other water. In weather as cold as this, water
26 that comes down out of the heavens freezes as soon as it hits the ground. I had just gotten to Cochran, had not been there over 30 minutes. I found ice there at that tank; I do not know that I found ice anywhere else that winter. I did not notice that wherever I found water I found ice. Don't know whether it had been raining. I know it had been snowing several days, and it was snowing then. Those several days I had been up and down the road everywhere. That was like the usual winter, when the sun was shining, it was warmer in the day than at night. Mr. Parks was with me, and I fell with this shoulder against the rail or cross ties, and I turned over on my left side and got up. When I fell, that threw the coat off, and I said, Mr. Parks, pick up the coat, and I got up, then I got right on the train. Could not stop there or I would have been left and lost my job. Had to hurry to get the train. As I came around the tank and came up to this place, I slipped and fell as I came up the slope. Don't know just how much slope there is, just a gradual slope, like any other bed of the road. I fell on the slope, my feet might have been four feet from the ends of the ties. Yes; as I went up the slope, my feet slipped out from under me and I fell. At that tank they have a drain box that takes the water—the drain water—out through a ditch, it does not run out on the track. That drain was not between the main track and the pass track; it ran between the cross ties and ran out under the tank, and ran out under the pathway. That was provided by the railroad. After I got up, I hurried to catch the train, which was moving off when I got up. I got in the caboose car, not the baggage car, and came on down to Skelton, and got the fixture I went for. Don't know really what time I got to Skelton, I reckon it was probably 9:30 or probably 10:00 o'clock. Did not stay there but a few minutes, just had to pick up a car and set it on the center, or something like that. Don't know what time it was when we got to Skelton; the engineer stopped and let me get a
27 flange union out of a barrel, and we went on to Norlina and stayed until 84, and then went back. 84 stopped at Cochran and put me off. It did not really stop there, because the conductor was sitting down nodding, and I told him the train had blowed; I was in so much misery I was not asleep, and he did not discover it until he saw the switch light, and he said, yes, that is so, and he

stopped after we passed the pump and he put me off and I walked back to the pump. The train that I left there on was the wreck train, which stopped at Cochran to take siding for this train that I went there on. I got on the wreck train and came to Norlina. The train from Norlina got back to Cochran about 4:30 or 5:00 o'clock. It was not daylight. I went to Mr. Lewis' house and I got Mr. Parks to let me have his two men to help me to put the pipe in, and we got down there about daylight, and got through about 10:30 or 11:00 o'clock and got the pump going. I then got on 35 and came to Norlina and then came on to Raleigh on 41. Have not kept any account and have no idea of the amount I spent for medicine. Did not have any doctor's bill; I only had Dr. Judd twice. Had him twice and he did not come any more.

Redirect examination.

By Mr. Simms:

Q. Mr. Allen has asked you about seeing water around tanks. Did you see any water at other times around back of tanks where this water was?

Objection by Mr. Allen for the defendant. Objection overruled; defendant excepts.
Exception No. 5.

A. No.

This ice that I fell on, with respect to the tank, was about 20 feet south of the tank, on the lower side of the railroad. It was not back of the tank, it was on the side. Have not seen water around tanks at that sort of place, nothing more than wasted by carelessness of firemen who would run it over sometimes. Never saw any
28 water or ice on that side of the tank. Was not walking on the cross ties at all when I fell. Mr. Lewis, the pumper, picked out the way for me to go. I was not able to do any work as plumber with my right hand; I contracted for it and my two boys did the work.

FRANK PARKS, a witness for the plaintiff, having been duly sworn, deposes and says:

Direct examination.

By Mr. Simms:

I now live at Dillon, S. C. Formerly lived in North Carolina; lived at Raleigh and was in the railroad service as section foreman in charge of the Seaboard yards here in the city. Do not now work for the Seaboard. In January, 1912, at the time Mr. Renn got hurt, was working at Cochran, Va., as section foreman, and had charge of the section in which the tank and scene of his injury were located. Was present when he was hurt. It was on January 14, on Sunday; at that time they were running the pump day and night, as others had frozen and was unable to supply them with water, and

the night man ran up until Sunday morning, sometimes late in the morning before he shut down and got the tank full and running over. He ran it over—Mr. Lewis did—and collected a good deal of ice around it, as it would freeze as it was very cold weather; and after running a good while it overflowed, and when it stopped there was a good deal of water and it froze after it hit the ground—and some before it hit the ground as it was trickling down the tank all around, and in the evening late he went down to start up again for the night run and it had froze during the day after he shut down, and was unable to start any more. I saw him run the tank over. Don't know exactly how long he let it run over, probably an hour.

It was Sunday, and I was at home, and I noticed the water
29 flowing all around and trickling down—it covered the tank all around the sides, trickling down; that attracted my attention, and he was unable to start up that evening when he came for the night run, as something had froze and bursted, he did not know what, and I was with him, and I could be of no assistance to find out what the trouble was, and so Mr. Renn was ordered to come down and make the repairs. I was with Mr. Renn at the time he got hurt. We had been down to the pump—to the engine at least—and found what was the trouble. He had been to the pump and found that some piece had froze that day and bursted and could not pump any more water until repairs were made, and he said, I have got that very piece we need at either Grandy or Skelton, I don't know which, and he said I can go up there on the night train and get back and make the repairs, and I will have to go before I can make the repairs; and while we were down there—and then we came up—and there was a train going in his direction, and Mr. Lewis said, if you will be in a hurry you can catch that train and come back on 84; and Mr. Lewis took his lamp—his lantern, and started off and Mr. Renn was right behind him and I was right behind Mr. Renn, making his way to the train, and when we got there near the tank, maybe 20, I will say between 15 and 30 feet, somewhere, he slipped down. There was ice there where it froze that day, and snowing at the time, and there was a little skim of snow over the ice, and he slipped and fell as quick as that, right across the road, and he grunted a little and I said, are you hurt, Mr. Renn? and he said yes; and he turned over; his right side struck, and he turned over and took his left hand and pressed himself up and got on up and he said, bring my overcoat, and he went on to the train; and someone pulled him or assisted him on, I don't know who it was, and I pitched his coat in, and he went on; and the next morning when I got out
at the usual hour of work, I found him and Mr. Lewis out
30 there, and he stated to me, you will have to furnish me labor to do this work, I am not able to, I am crippled, I cannot use my right arm; and I said, all right, and I called my hands and went down there with him, and we assisted him in doing his work and got everything in shape. He seemed to be suffering pain pretty smartly the next morning when he came back. I saw him after that; he was there one time after that while I was there. Am unable to say how long, it map have been two or three or four weeks,

I don't know, but sometime after that. As to his condition, he was carrying his arm or hand stuffed in his vest; he could not use it in the shape he was in, and he called on me that day to assist him in doing his work, and I did so in making the repairs because he could not use his arm; he told me he could not do it or told me I would have to furnish him labor to do it, and I did so.

Q. Why was the tank running over?

Objection by Mr. Allen for the defendant. Objection overruled; defendant excepts.
Exception No. 6.

By the court:

Q. Do you know?
A. Yes; because the pumper was neglecting his duty and let it continue to run after the tank was full.

By Mr. Allen: Defendant asks that that answer be stricken out, as there is no allegation of such negligence in the complaint.
Motion overruled.
Objection by defendant and exception by defendant.
Exception No. 7.

The best of my knowledge, I believe it was about 200 yards from the tank to the pump, in view, plain view of each other. Mr. Renn got there in the night; the weather then was cold and snow-
31 ing. We had had several snows along before that for a week or ten days or more—little at the time—snowed pretty smartly and may have stopped and snowed again in a few days; and that Sunday I think it began snowing in the afternoon lightly. Don't know how deep the snow was at the time Mr. Renn go- hurt; it might be four or five inches, something like that. I was not there in charge of that section very long; went there the latter part of August or the first of September, and stayed on until April or May, 7 or 8 or 9 months. Stayed there all through that winter.

Q. Was any ice usually around that tank at the place where Mr. Renn got hurt?

Objection by Mr. Allen for the defendant. Objection overruled; defendant excepts.
Exception No. 8.

A. No; not usually, it was not. Where the tank set was near my toolhouse door, sloping from the tank down the hill, and the water would not stand but little, and kept it dry. Good drains all around the toolhouse. I would take my shovel and make a little drain so it would run off quick.

I do not think there had ever been any ice before where Mr. Renn got hurt. I had been there twice a day, coming in and out of my toolhouse. I am not related or connected with Mr. Renn in any way.

Cross-examination.

By Mr. Allen:

I have been staying at Mr. Renn's part of the time since I have been here, and part of the time at the hotel; sometimes I would see him during the day and he would invite me to go to his house. I am not an employee of the Seaboard. To the south of the water tank there is a high hill, with a bridge on top. There is a slight slope from the bridge down to the depot, and then from there on to the tank is pretty near level, to the best of my recollection, and from the tank where it sets, it is sloping down hill right towards
32 the pump house; and there is a slope down hill from the railroad track down east, under the tank. It starts under the tank, and there is a drain in there to catch the overflow and carry it off. I usually kept that open myself with shovels to keep water from standing there. That was one of my duties. I looked after things around there; anything I saw needed doing. I kept the drain open. Water would not stand there, as the water ran off down the drain, which went under the tank, level with the ground. There was no pipe there. There was an old box, I think, under there. It did not stand up above the ground. Was level with the ground, that is, under it. The pump house is to the north of the tank, towards Richmond, down in a bottom. There is a grade all the way down there. There is a 20-foot fill at the pump house; I expect it is that much. To get to the pump house, you can go down the railroad and cut down that fill; you can do that. There is no foot way, but I have known people to go that way, and another way there is a path down the side of the fill from the tank to the pump house, a little foot path, which I generally walk to and from, it starts from my toolhouse and leads around it and goes to the pump house. When you come up from the pump house you are close to the railroad. There is a little path right by my toolhouse. That is not a round about way, it is the nearest way. Coming up to the tank, from the north going south, there is a little path which comes right along besides the fill, the right of way and comes up to the north of the tank, then you are not very far from the railroad track, but it was usually the best walk to go around to the left of the tank and come around there, and when you get there by the tank, you are on level ground. As a matter of fact, you can go anywhere you want to go, and people going from the pump house to the station, go up the fill. I have seen some go from the depot down the railroad and slide down the fill, and I have seen some climb the fill, but it is hard to climb up. The usual way is
33 the straight track path along down the fill to the tank, then around it to toolhouse, and right by the toolhouse to the railroad. There is a little grade there, then you are about 15 or 20 feet from the tank. When the tank overflows, the water comes down the sides and drips beside the tank; but of course, with a heavy overflow it spreads, and then it goes down in the bottom. It is not down grade all around from there, it is up grade. There are grades all around there. I looked after things the best I could around the tank. That was a hard winter. Everything was frozen up. Had a good deal of snow, rain, hail and everything else that winter; and the force work-

ing there for the Virginia Bridge & Iron Company had to quit on account of the snow and sleet for a week and maybe more. This was on account of the cold. The Sunday Mr. Renn got hurt, he and I had not been working about the water. We made an examination and found what was the matter. It had been snowing, not four or five inches, before he left, only a little snow. During the whole month of January—I guess there was snow there the whole month in spots. It would snow and melt off during the day and then the ground would freeze where there was snow and melted, it was slick, generally. Around my house, where we walked around, there it was rough, but other places, it was slick. That was the hardest winter I had ever seen at Cochran. I do not know but what that was the hardest winter I have ever seen. Not all of the water tanks and pumps on the Seaboard were frozen up, or trains would have had to stop, but some were in both directions, and I was ordered to run the pump day and night. As to keeping the tank full, I had nothing to do but employ the pumper and see that the tank was kept full or a supply. Sometimes he kept it full and sometimes it ran low, and then he would have to pump when a train was not there and keep it full. Sometimes the pumper does not stay at the pump house—leaves the pump running to fill up the tank. But I am not
34 positive about that. There is harm from the tank overflowing. When they get full generally they ought to be stopped as it saves coal and wear and tear of machinery, and a man on his job will do that. Also waste water. If it does waste, it does not make any difference except the waste of water. When we came from the pump house we came up the path beside the fill; right smart snow down in that bottom; thick ice on the pond; next morning had to cut it to make repairs with an axe. I think it must have been 15 or 16 inches thick. That was hard work and I needed my force to help do it. He could have done that by himself. I think if he had not been hurt—I think he and the pumper could have done the work and not bothered me; I had from five to ten men. Did not use them all down there that morning. Had two or three to do the work and I did not have the others at work. Trains stop at this tank to take water pretty frequently; sometimes they would pass by. Trains from Norlina to Richmond. Those two times were the only times I ever saw Mr. Renn there looking after this pump. As to the duty of a pump fixer on a railroad to look after tanks and valves, it is his duty to find anything the matter and report it to his superior officer and the superior officer will send a force there to repair it. I think the pump repairer, that would be Mr. Renn, attends to the valves. Freight and passenger trains stop there and take water. I walked behind Mr. Renn, and Mr. Lewis was in front with the lantern. I did not put Mr. Renn in front, he put himself. I was behind looking after some poles that fell down and I looked after it to see there was no danger, and that put Mr. Renn in front of me and Mr. Lewis was in front of him with the lantern, and I was behind Mr. Renn. The point he fell was 15 or 20 feet south of the tank, going up a little slope. It was a little descent from the rail down and that is where he slipped. I was not looking at his feet when he slipped. I was looking where

I was walking. I was trying to keep from slipping myself.
35 I didn't slip. I could see snow all around there. Had a light there, a lantern. The light did not show that it was slippery. Snow had fallen. It was snowing at that time. You could not see that it was slippery, it was all covered up by snow. The reason I was walking carefully, I always try to walk carefully, especially when there is snow and at night. A man ought to be careful. Mr. Lewis did not slip. Mr. Renn went and caught the train, the train was in the act of moving off when we were at the tank. Mr. Renn wanted to catch it, Mr. Lewis hurried up, walked peart, and Mr. Renn walked peart and I was walking peart behind them. We were all walking peart up that slope so that Mr. Renn could catch the train, when he fell and he did not have on his overcoat, and as he fell that fell off, and he said, I wish you would save my coat, and I picked it up, and when he got on the train some one reached him, and helped him on. I saw him the next day. I do not know whether he got a doctor. He did not get one there. He did not say anything about a doctor. He said this, he said he was not able to work, and he said he had wired Mr. Elmore for a man to relieve him, so that he could go to the hospital and get his bones fixed. I did not hear him say anything about getting a doctor at Cochran. I was discharged by the Seaboard.

Redirect examination.

By Mr. Simms:

I will tell you about that, being discharged; Mr. Redman, under whom I worked at that time was transferred from there to the second division, and the man that taken his place up there, I don't suppose I suited him, and in a very short while after he got there, he relieved me, and sent another man to take the job. That is all I knew about it. He never made any complaints to me whatever. I got employment with the Seaboard right straight again on another division. Mr. Renn told me something about wiring Mr. Elmore to relieve him, so that he could go to the hospital for his bones, he said
36 He said that he was broke all to pieces, in the shoulder, that is what he told me. The usual walkway from the pump up to the railroad goes by the tank. That was the walkway that Mr. Renn was in at the time he got hurt. I don't remember whether we had struck any of the ice along that path until we got to that point that night. It seems that there had been snow along here, and it was mashed in, and there were tracks in the snow and frozen. Of course, tracks through the snow made it rough. I had seen the ice around the tank during the day.

Recross-examination.

By Mr. Allen:

When I got that new job on another division, I was discharged there.

Redirect examination:

I will tell you about that. I had an extra force down there, and there was the work train force. I was giving my men $1.15 per day, and there were other forces up and down the road giving $1.25, and I would get me a bunch of men and they would leave me and go to the other force and get 10 cents more and I could not keep sufficient force of men to do the work, and I judge that was the reason I was relieved. The Seaboard would not allow me to pay more than $1.15 for the men.

By the Court:

Yes, I saw the ice and water there that day, Mr. Renn is right, he was some four or five feet from the ends of the cross ties where he fell, he was going up to them. I saw ice along there that day where he fell, there was ice all around there from the top of the tank to the ground. That was water that came from the tank that day.

The plaintiff rests.

37 The defendant moves for judgment of nonsuit upon the ground that the evidence offered by the plaintiff fails to establish negligence on the part of the defendant as alleged in the complaint. The defendant moves for judgment of nonsuit and to dismiss the plaintiff's action upon the further ground that the cause of action alleged in the complaint is based upon the common law and the statute law of the State of North Carolina, and the plaintiff's proof shows that he was employed by a common carrier by railroad engaging in commerce between the State of Virginia and North Carolina and other States at the time of his injury and was at the time of his injury employed by such carrier in such commerce, and the cause of action proved arises under the Act of Congress of the United States of April 22nd, 1908, known as the Federal Employers' Liability Act; that there is no allegation in the complaint that the plaintiff was employed in interstate commerce and no allegation of facts constituting a cause of action under the act of Congress; that the case proved was not pleaded and there is a total variance in pleading and proof. Motion overruled and defendant excepts. Exception No. nine.

Exception No. 9.

Plaintiff thereupon moved to amend his complaint so as to allege that at the time plaintiff sustained the injury complained of, plaintiff was employed by the defendant in interstate commerce.

The defendant objects to the allowance of this amendment to the complaint upon the ground that it introduces a new cause of action, to-wit: a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States while he is employed by such carrier in such commerce, which cause of action arises under

the act of Congress of April 22, 1908, known as the Federal
38 Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section 6 of the said act of Congress, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the act of Congress of April 22, 1908.

Objection overruled and defendant excepts. Exception No. 10.

Exception No. 10.

The defendant also objects to the allowance of the said amendment upon the ground that the Court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. Objection overruled and defendant excepts. Exception No. 11.

Exception No. 11.

The defendant also objects to said amendment upon the ground that it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend and asks for a continuance if the amendment is allowed. Motion overruled and defendant excepts. Exception No. 12.

Exception No. 12.

39 Plaintiff thereupon filed the following amendment to his complaint:

Amendment to Complaint.

NORTH CAROLINA,
Wake County:

In the Superior Court, May 31st Term, 1915.

(Title of Cause.)

The plaintiff amending his complaint by leave of the Court adds thereto the following to paragraph three, to-wit:

3*a*. That at the time the plaintiff suffered said injuries he was in the regular employment of the defendant as a pump repairer working as from time to time ordered by the defendant on the pumps used in connection with the line of defendant's railroad extending between the City of Raleigh, in the State of North Carolina, and the City of Richmond, in the State of Virginia; and at the time the plaintiff suffered said injuries he had been sent by defendant from his home in Raleigh, North Carolina, to Cochran, Virginia, to repair

a pump of the defendant at said Cochran, Virginia, and he had visited and inspected said pump and discovered the need of a coupling or fitting or flange or union which was not obtainable at Cochran, Virginia, and which he thought (as afterwards proved true) the defendant had at Skelton, Virginia; and the plaintiff at the time of suffering said injuries was going along the usual path from said pump past a water tank of the defendant at Cochran, Virginia, to board at Cochran, Virginia, one of defendant's trains and to go to said Skelton, Virginia, to get said needed part or appliance to be used by him in repairing a pipe connected with the said pump at Cochran, Virginia, which pump had theretofore been and was thereafter to be used by the defendant in pumping water into the said tank at Cochran, Virginia, from which tank water was from time to time taken by trains of the defendant, some of which trains were at such times being operated by defendant while engaged in
40 interstate commerce, and that the train which the plaintiff was going to board and did board was at said time engaged and operated by the defendant in interstate commerce; and that at said time the defendant was a railroad company engaged as a common carrier by railroad of freight and passengers in interstate commerce between the State of Virginia and the State of North Carolina.

(Signed) R. N. SIMMS,
(Signed) J. C. L. HARRIS,
Attorneys for Plaintiff.

NORTH CAROLINA,
Wake County:

J. T. Renn, being duly sworn, deposes and says: That the foregoing amendment to his complaint, and his complaint as thus amended, are true to his own knowledge, except as to matters therein stated upon information and belief, and that as to those matters he believes it to be true.

(Signed) J. T. RENN.

Subscribed and sworn to before me, this 11th day of June, 1915.

(Signed) A. T. SHAW,
Notary Public.

My commission expires July 21, 1916.

Upon the foregoing amendment to the complaint being filed, the defendant renews its objections to its allowance, as follows:

The defendant objects to the allowance of this amendment to the complaint upon the ground that it introduces a new cause of action, to-wit: a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States while he is employed by such carrier in such commerce, which cause of action arises under the act of Congress of April 22, 1908, known as the Federal
41 Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section 6 of the said act of Congress, providing that no

action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the act of Congress of April 22, 1908. Objection overruled and defendant excepts. Exception No. 13.

Exception No. 13.

The defendant also objects to the allowance of the said amendment upon the ground that the court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. Objection overruled and defendant excepts. Exception No. 14.

Exception No. 14.

The defendant also objects to said amendment upon the ground that it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend and asks for a continuance if the amendment is allowed. Motion overruled and defendant excepts. Exception No. 15.

Exception No. 15.

The defendant filed the following answer to the amendment to the complaint:

42 *Answer to Amendment to Complaint.*

NORTH CAROLINA,
Wake County:

Superior Court, May Term, 1915.

(Title of Cause.)

Reserving its objection and exception to the amendment of the complaint herein, the defendant answers said amendment as follows:

3A. The defendant denies that the plaintiff sustained any injury as alleged in the complaint and the amendment thereto, and denies that the plaintiff was going along the usual path from the defendant's pump past the water tank at Cochran, Va. The defendant admits that at the time alleged the defendant was a common carrier by railroad of freight and passengers in interstate commerce between the States of Virginia and North Carolina, and that the plaintiff was at the time alleged in the complaint employed by the defendant in such commerce.

And the defendant further alleges in answer to said amendment that the cause of action alleged in the complaint as amended arises

under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and the plaintiff cannot maintain the said action because he did not commence it within two years from the time the cause of action accrued, as required by Section 6 of the Act of Congress of the United States of April 22, 1908, known as the Federal Employers' Liability Act, the alleged injury having occurred and the cause of action having accrued January 14, 1912, and the amendment to the complaint having been made June 11, 1915, and the defendant pleads the provisions of said Section 6 of the Act of Congress and the plaintiff's failure to commence his action for injuries received while the defendant was engaging in interstate commerce between the States of Virginia and North Carolina
43 and while the plaintiff was employed by the defendant in such commerce within two years from the time the said cause of action accrued, in bar of plaintiff's right to recover in this action.

(Signed) MURRAY ALLEN,
Attorney for Defendant.

Verification waived.

Defendant offered the following evidence:

E. V. Barbee.

E. V. BARBEE, witness for defendant, having been duly sworn, deposes and says:

Direct examination.

By Mr. Allen:

I am employed by the Seaboard as pump fixer and succeeded Mr. Renn in that position, a month or two after Mr. Renn left. I hold the same position that he held, that is, fixing pumps between Raleigh and Portsmouth and Raleigh and Richmond. My duties are keeping up the pumps and tank. In connection with these duties, I have to climb up the side of the tanks, also climb up over inside of the tanks. Am engaged in fixing the tank valves when I find it necessary to climb up inside of the tank. Cannot get at that in any other way. The average height of tanks on the Seaboard from top to bottom part of them is about 30 feet, and part of them a little more than that. The tank part is 16 or 18 feet. The pump is not located right at the tank. The pump at Cochran is located down on the side of the railroad, down by the fill, some distance from the tank. The pump is in a house. The pumper does his work in this house. Near this pump is a pond, and that pump forces water from the pond up to the tank. The tank is to supply trains Norlina to Richmond and back. Any train can stop there and get water. In the performance of my duties I go from one tank to another up and down the line, between Raleigh and Richmond and Raleigh
44 and Portsmouth, and all of these tanks are under my control. I find a great deal of water around these tanks.

Q. Mr. Barbee, you find a great deal of water around these tanks, don't you?
A. Yes.

Objection.
By Mr. Simms: I object to this on the ground that it was some time after the plaintiff got hurt.

By the Court:

Q. Do you know about them before you went into the work?
A. No.

Objection by Mr. Simms sustained and answer stricken out. Exception by Mr. Allen for defendant. Exception No. 16.
Exception No. 16.

I was a blacksmith before that. The pumper in the pump house cannot at all times see the tank. I have worked on the tank at Cochran. The path that runs from the tank to the pump house down by the side of the hill leads out from the north side of the tank, and that is where the path ran from the north side of the tank at the time I took this employment as pump fixer about two months after Mr. Renn.

The witness is handed a paper showing a diagram of the location of the tank, pump house, etc., at Cochran.

There is a path which leads out on the north side of the tank and goes north to the pump house. It comes across the railroad there in front of the tank and goes to the pump house. There is no path that goes around the tank. The tool house is located to the south of the tank.

The witness points out on the diagram the location of the tool house, the station, the tank, the pump and the tracks.

45 The Court states that the diagram in question is only permitted to be used in illustrating the testimony of the witness and for no other purpose.

There is a place there in the tank that the water runs out while engines are taking water. Is called an air valve. That is on all tanks of this character, with the exception of one or two on the Virginia Division, there is an air valve on this tank, and water ran through that when an engine was taking water. When an engine is taking water from this tank, there is a spout to the tank, you know, and they pull that down and put it into the man hole in the engine tank and they open the valve with a rope. The way it is cut off, turn the rope loose and it cuts off itself. After that is done the fireman throws the spout back up, or lets the spout go back up, and the water that is in the spout, when he throws it back up, runs back out of the other end, on the ground. I have seen a tank of this character overflow. Have seen the tank at Cochran overflow. The water runs down back of the tank. When it overflows out of the top, it comes right down the sides of the tank and falls on the

ground under the tank. There is a grade at Cochran which runs down towards the pump. I think it takes a pretty good man to fill my job. I find it pretty tough. My hours of work, all of the time; supposed to be. I am on duty all of the time, day and night; subject to call at any time, regardless of the weather. I have most demands made upon me for service in bad weather.

Cross-examination.

By Mr. Simms:

I do not know where I was at the time Mr. Renn got hurt. I do not know what the condition of the tank was on the 14th day of January, 1912, at the time Mr. Renn was there. I do not know whether at that time it had any air valve or not. I do not know whether at that time there was a path that led around to the south of the tank and between it and the work house. These con-
46 ditions that I have described are those that have existed when I taken charge of the job. There was an air valve on the tank at the time I took charge. The air valve is located close to the bottom of the tank, at the bottom of the tank. It is for the purpose of letting air into the tank. I suppose the air goes into the outlet pipe. If it is not there, you cannot hardly hold the valve open. I do not know where the air goes to. The tank has no cover. It is not like a jug, or anything like that, that you have to let air into. It is open, and when you open the valve the water runs out of it, like out of a tub; it runs out of a spout freely. I do not know what the air valve is for. It is on there; that is all I know. The air valve is at the bottom, and when the water runs out of the spout, water runs out of it. As to it being a water valve instead of an air valve, because water runs out of it, instead of air, I do not know about that. As to the reason why it should be open, and water running out of the spout, will say if that is not done, you can't hardly hold the valve and the spout down. I know that. When you put the spout down and open the valve water runs out of the spout. As to how a man opens the air valve, it opens itself; the water does it. There are one or two tanks on the Virginia Division that have not got it. This tank at Cochran is open at that time. Air valves are in tanks that are not covered. I do not know whether an air valve is one that lets air into the tops of a covered tank between the top and the water, and forces the water out. I do not know whether as a matter of mechanics that is the only use for them. As to it being used only on tanks that are closed at the top, there are none covered on the Virginia division. I did not tell you awhile ago that there was such a one. I do not know whether tanks on other divisions have covers over them. I do not know about tanks that have air valves being covered.

I do not know whether this tank at the time Mr. Renn was working at Cochran or before that time had an air valve or not. That tank is a right smart little ways from the pump house at
47 Cochran. More than 100 yards. If you are standing outside of the pump house you can see the tank. You can

stand at the tank and see the pump house. Nothing to keep a man if he is outside of the pump house, from looking at the tank and seeing it. If he would go a little ways toward the tank, say eight or ten feet. He could take three or four steps outside of the pump house and see the tank.

Redirect examination.

By Mr. Allen:

From the pump house you cannot see that the water is running over from the tank.

Recross-examination.

By Mr. Simms:

I have tried it several times. Not since I have been a witness in this case, as I have not been at Cochran since then. I was not down there looking to see whether I could see it or not. I stepped outside and looked at the tank and then went up there and it was overflowing. It took sometime to walk the 200 yards from the pump house to the tank. I swear that I cannot look at that tank from the pump house and tell whether it is running over. I cannot step out of the pump house two or three steps, eight or ten feet, and see whether it is running over or not. I can see the tank, but I cannot tell whether it is running over. My eye sight is fairly good.

I do not know exactly how far it is. I have never measured it. My best judgment is that it is something like two hundred yards, 600 feet. I do not know whether a city block here is four hundred and twenty feet or not. I do not know if you were to stand out here and look down the street, it would be about as far away as the next street. I do not know whether the streets are ninety feet wide or not. If that is so, I do not know whether you can stand here and look at Myatt's and tell whether water was running over that wall or not.

48 *W. E. Nash.*

W. E. NASH, a witness for the defendant, having been duly sworn, deposes and says:

Direct examination.

By Mr. Allen:

I am employed by the Seaboard as agent at Cochran, and have been there about seven years, I was agent there in the month of January, 1912, all of that year; also 1911 and 1910. My duties require me to be around the station and the yard. I go over to the water tank occasionally and see that everything is all right. I am familiar with the surroundings there and the lay of the land, know the way the land runs, and everything as far as the right of way goes, and the way it lays. I recall the winter of 1911-12. Very

cold, one of the coldest winters I ever saw. I think on the night of January 7th, it began snowing, and if I am not mistaken, we had snow and rain, and it would freeze from then to the 20th of January, snow on the ground at least 6" deep or more than that. And the most of that was frozen, and the snow and ice and rain had all gotten on the ground, there was ice around Cochran and around the station, all over the country everywhere, except the place I had cleaned out in front of the station to get on and off the train. That was the only clean place around there. The walking around there when we got out of the place that was cleaned off was covered with snow and ice, and sleet, and it was slick. It was slick everywhere, in the county roads and everywhere else.

From a point opposite the station, it is a slope down to the pump house at the branch. We have got a branch running through there and it is a slope all the way and it also extends under the tank. I think the height of the fill from the pump house up to the track is at least 30 feet or more. I am familiar with the path which extends from the tank to the pump house. Ever since I have been there
the path comes right by the tank, here to the north side of
49 the tank, and extends down on the ground in the fill. The fill extends beyond the tank, and the path was beside the fill down to the pump house. There was no path that I know of behind the tank, in fact, there was a ditch which starts here and runs out here, and there is no path that I know of behind the tank, in fact, I know there is not one there.

The usual way to get from the station to the pump was to the north of the tank, that's the only path that I know anything about. That did not pass between the tool house and the tank. That path has been there at least seven years, as long as I have been agent up there, the path was there when I came, probably had been there longer than that. It comes up on the north side of the tank, up to the railroad, crosses the railroad and on to the station. The land there insofar as the tank is concerned, slopes off towards the branch, here where the pump house is. I have seen that tank overflow. I have seen it overflowing before and since the time in question. I worked right at it and if it overflows I see it. There has been no change in the location of that tank. It is in the same place, it was when I went down there and since I have been there. When it overflows since 1910, the water flows out of the east side on account of that being on the sunny side and it got the staves at the top kinder rotten. They came there to paint it, and they had to put up a swinging ladder, and on this side they were scared to trust those staves and they cut some trenches and put the hooks to hold the ladder in, and ever since then if the tank overflows, it pours out on the east side, after the water flows out on the east side it runs down to the pump house. None comes up on the east side. The land is on a slope, and is higher at the track than at the tank. Water will not stand around that tank, not to amount to anything at all. It might be where this water pours over, it may have cut out a little basin, that holds a little bit, it would not stand at a point between

the tool house and the tank on account of the slope there.
50 It is right there on the hill, and there is no way the water can stand there.

When the tank overflows, the water runs down beside the tank, comes right straight down. The pipe is about 4″ where it runs up, and there are five or six of those little places at the top, and they carry the water right straight down. If it did overflow anywhere else, it would flow down beside the tank. That is a big tank that supplies the engines. The water is pumped into the tank from the pond. There is a pipe line extending into the ground until it gets to the tank and it goes up over the tank and pours down into it. It comes from the pump house. It fills up like a bucket that you had stuck a hose in. The location there now and the surroundings are the same as they were in 1912, in January, practically the same. No change has been made at all.

Cross-examination.

By Mr. Simms:

As to the cut-out places, they painted the tank on all sides, did not just paint it on the east side. They hung the ladders on every side. They did not put the slits on every side, just on the east side, and where the sun shown on its staves, it caused them to rot. The sun shown on nearly all sides of the tank during the different times of the year, but on the sunny side it rots first. It is a round tank. I expect I was over at the tank on January 12, 1912. I was around the station. It is quite possible that I was there. I could see this ice there. I said possibly because I am there practically every day two or three times. It is on the opposite side of the railroad track from the station. I do not live on that side, but I have to take train orders over there every day, and I have to go there to take the orders, I do not cross over on the east side to take the orders, my station is on the west, and I go to the west. The train would be standing between me and the tank, but I could be
51 where I could see it. I do not know that I walked around it. I would not have to go down there and look under the cars. I could get within 10 feet. I do not go out there ahead of the train. If I have a No. 19 order I go up there. I do not know whether I had a 19 order that day. As to whether I was out there that day, I could not swear that I went and stood by the tank, I am right in sight. I can see without going out there. The station is 35 or 40 yards away from it, right in plain view, across three tracks, two of them are side tracks. Sometimes cars stand on the side tracks. I do not know whether there were any there that day or not. As to the path way around on the other side of the tank, I do know there was no path around there that lead to the pump. Where did it lead to? A. There is no path around there. That is all there is to it. There is no path between that tank and the tool house, only an open space. As to people walking on it, if they had any business they could. Nothing to keep them from walking on it. There is something to keep them from walking around on the south side of

the tank, in going to the pump house, I would not like to go that way, you have to step over a ditch two feet deep. Ditch ran north from the tank. After coming out from under the tank it ran north. The ditch was not covered. The ditch was between our right-of-way and the farmer's land that adjoined it. It lead north, but come out from the east of the tank. Mr. Parks used the tool house as foreman of the section. That was probably 25 feet from the tank, as well as I could estimate it, I reckon. I did not say anything about the land between the track and the tank on the west side being on the slope. The tank is on the east side and the land between the tank and the track slopes back off from the track, to the east and the north. As to the slope I suppose it is a fill, at least the track was put at the tank about 18 inches or two feet from the lay of the ground, and it is about 200 yards from the tank to the pump house as well as I remember, I suppose from the track to the tank
52 is 8′, I reckon probably a little more than that. As to not being able to get water at that distance, you have got a spout. I suppose the spout is 10 feet. The spout comes over the middle of the track.

O. F. Cain.

O. F. CAIN, a witness for the defendant, having been duly sworn, deposes and says:

Direct examination.

By Mr. Allen:

I live at Cochran, Virginia, and have lived there 6 or 7 years, since about 1909. I run the pump there now, and have been running it since 1912, in August. I did not run the pump prior to the time I took charge in 1912. Prior to that I had worked on the section for 12 months or more off and on. I do not know how long. I was working at Cochran in January, 1912, I remember the kind of weather we had there at that time. That winter was the worst weather I ever saw, the coldest snow on the ground, hail and sleet. It was the coldest weather I ever felt. I will tell you what I was doing, and I can explain it. I was out in it day and night, working for the Virginia Bridge and Iron Company, watching for them and in the day I was at Cochran, and around home, at the day time, and around the place at night, and it was so cold that everything froze up so that I could hardly get about all during the month. Some of the Virginia bridge and iron force lay off from work on account of being froze up so that they could not do anything, could not stand up and do the work, could not get up on the bridge, all they could do to stand on the ground. Much less on the bridge. Everywhere was cold, snow and ice and rain and it would freeze as it would fall and sun would shine out and it would melt and it would freeze that night and snow on top, and *that* that way the whole month pretty near. I am familiar with the surroundings there. I know where

53 the path that runs from the pump up to the tank and station comes, runs out from the pump house on the north side of the tank, and comes across the track and goes down to the pump house. There is a 22 feet fill at the pump house. The fill there in front of the tank going up to the railroad track where you come up on the north side where this tank comes up, there is about a three foot grade, right there. I mean that the track is three feet above the point down at the tank that slopes down hill to the pump house. Goes down hill all the way. There is a slope down grade all the way from the tool house to the pump house. The hill that ends in the bottom in the pump house begins back yonder at the overhead bridge, back nine hundred and some feet from the bridge to the tank. The slope begins at the overhead bridge and extends down grade to the pump house. Of course right in front of the station it was more level, but it was down grade, where that little grade is, is back this way towards to the south from the tool house. There is no path that comes around behind the tank. I have never seen one there. Since I have been there the same path is used going from the tank to the pump hous that was in use, in January, 1914. I go north towards the pump house, come up to the north side of the tank, there is a path right by the pump house that comes up the fill, but I never use that; it was too much grade. It comes up the fill to the railroad track, but I did not go up there, I came up this way by the pump house, everybody that lives there uses that too. The distance from the tank to the pump house is 514 feet. I have seen this tank overflow before and since January, 1912, when the water runs over the top, and runs out on the east side, opposite the track; what makes it run out, there is little notches cut in there, I do not know what it was put there for at the time, but there is where it overflows. The water that overflows there runs out under the tank and down to the pump house into the branch.

54 Cross-examination.

By Mr. Simms:

It was cold that way before Christmas and on, not that exactly. I said all during the month of January. It was pretty near that cold, I know. A long cold spell. The track there by that tank is three feet higher than the ground under the tank. On the north side where this path comes out there it is three feet from the ground level with the track. There is not a little level place about the tool house, back of the tool house not exactly level, but a little more level than between there and the bridge. Out in front of the tool house it is not level, it slopes down to the pump house. That is the general slope down there, enough to drain water off if any happens to fall there to drain away. I was around home there on the 14th of January, 1912. I do not remember whether I was at the tank, as to not knowing what happened there. I was there every day or two, but I do not remember being there that day.

L. H. Abernethy.

L. H. ABERNETHY, witness for the defendant, having been duly sworn, deposes and says:

Direct examination.

By Mr. Allen:

I live at Cochran; in the general merchandise business; was living there in 1912—January. Have been there about sixteen years. Ever since the road was run through there. I remember the weather in 1911 and 1912; in January, 1912, it was exceedingly cold; all kinds of cold weather, such as snow and hail, freezing up and such as that every night for the whole month of January. It snowed several days after it began and froze; snow on the ground, about six inches deep when it fell, but at times it was deeper than that. The surface of the earth around Cochran was slick everywhere and rough going. I know about the employees of the Virginia Bridge & Iron Co. laying off. It was two or three weeks in January.
55 They laid off because they could not work, and on account of the weather being so bad. That was the roughest winter we had had since I had been there. It was the roughest I have ever seen. I may have seen it that rough, but not as long as that. I am familiar with the station and have been down to the pump house. I know which way the path runs from the station to the pump house, the general path, the usual path. I think some people go down the railroad track, but they have to go down the fill; others go down at north of tank. There has never been any path behind the tank; between the tank and the tool house, going down to the pump. The conditions between the tank and tool house as to walking, of course, it is smooth enough to walk on, yet it is not a path, and people generaly come up the hill the nearest way instead of walking around the tank. Of course, they could go there. There is a small ditch there in the bank; side of the tank, that carries the water off. I have noticed the tank and seen it overflowing, before 1912, and since then. It generally overflows on the opposite side from the track. I have always noticed that and on account of those pieces at the top being taken off or broken off, and it overflows on the opposite side. That is, on the east side I suppose. Water that overflows there comes back towards the pump. The land between the tool house and the tank is sloping. It slopes from the track towards the tank, and that slope leads on under the tank and on towards the pump house. If water should fall on that place, it would run north toward the pump house.

Cross-examination.

By Mr. Simms:

My store is 200 yards from there; up the track from the depot; up the hill in the opposite direction, going from the depot towards my store, your walking is practically a little bit to the north. I am 200 yards west of this tank. I lived a little bit further than the store;

just across from the main county road; still further west. I
56 have no business that carries me over there on the east side of the railroad every day. As to nothing being down there in that hollow, except the pump house, I suppose some people live further on, and the firemen is down there. Nothing down in that particular section, except the pump house, down in that hollow. As a business man I did not spend much of my time around that tank. I cannot say whether I was down there on the 14th of January, 1914. I suppose there was ice there that day; there was ice everywhere there was water. I know that ice was there. I did not see it. The ditch that has been spoken of runs off from th- side of the tank parallel with the track. It leaves east and turns down the track north. It leads off from the north side away from the tank. The ground around the tank is smooth; not sloping, and between the tank and tool house, it is general yard and smooth enough to walk on.

Redirect examination.

By Mr. Allen:

There is a general slope from the overhead bridge up above the depot down to the pump at the pond.

J. T. Renn.

J. T. RENN, the plaintiff in this action, having been recalled by the defendant, deposes and says:

Recross-examination.

By Mr. Allen:

Dr. Judd first visited me directly after I was hurt. I do not know how long, I think it was the second day; I am not sure about that. I came back on the day of the 14th and they called me on the night of the 16th to go out again. I was here the day of the 15th. I have had no other doctor except Dr. Judd. I did not go down to Rex Hospital to see Dr. Moncure for treatment. I went down to have my picture taken, and have an examination by Dr. Moncure and an X-ray was made. I did not go back and get it, I did not have
57 money to get it. I went down and Dr. Moncure made it. I did not go back to get it at all.

Redirect examination.

By Mr. Simms:

He wanted $10.00 for it.

Recross-examination.

By Mr. Allen:

I went to Dr. Burke's office, and he sent me to Richmond to Dr. Hazen to have an X-ray made there, and he made an X-ray of my shoulder. I am not positive whether that was in April after I got

hurt in January, I know they kept me on the road, they never would send anybody to relieve me until I got up with the general superintendent. I don't remember how long that was after I was hurt. It was several days. They sent me to Norfolk to buy some stuff—some pipe and valve—to install a tank in Weldon, and I got hold of Mr. Shea. That was Mr. J. M. Shea, the general superintendent. He said, "Renn, what are you doing with your arm in a sling," and I said, "I fell and broke my shoulder."

Objection by Mr. Allen for the defendant on the ground that the answer is not responsive.

I do not remember whether it was in April when he went to Richmond.

Redirect examination.

By Mr. Simms:

Mr. Shea, the general superintendent, sent me to Richmond. He sent me to Petersburg to Dr. Burke.

Recross-examination.

By Mr. Allen:

I do not know whether the Seaboard paid my expenses. I did not pay Dr. Burke or Dr. Hazen. I did not pay anything, and I ain't never seen the pictures.

58 *Dr. C. M. Hazen.*

Dr. C. M. HAZEN, a witness for the defendant, having been duly sworn, deposes and says:

Direct examination:

I am a practising physician of Richmond and have been practising since 1897, I graduated in '97, from the Medical College of Virginia, am licensed to practise medicine in the State of Virginia. I did general medicine and surgery for a long time and then special work, general X-ray work and electric therapeutics. I have a machine for making X-ray pictures, and not connected with the Seaboard in any way. I taught in the Medical College of Virginia for 14 years, physiology and lectured on the same branch.

The witness is pronounced an expert by the Court.

I examined Mr. J. T. Renn, plaintiff in this case. The first date was April 25, 1912. I had at that time made an X-ray examination and as a result of that examination I found there was no trouble with the bones, the bones were natural as the- should be. No break, no fracture, no bones chipped off. The shoulder was normal as far as the examination showed. There are three bones entering into the shoulder joint, he had symptoms of pains and stiffness, and I looked them over in a general way as any doctor would to see where the picture was to be taken. In the shoulder joint you have three bones, the

end of the collar bone and the shoulder blade and the arm bone. These bones were in position, they were not broken and none of the edges were chipped off. I am sure the bones were normal. The shoulder joint was normal.

Cross-examination:

As to whether or not there are some things in a man's shoulder that do not show in an X-ray picture, I will say the tissues of
59 course; it is a comparative shadow, a comparison of bone shadows with other shadows. Ordinarily nerves do not make a shadow. Sometimes alignments make a shadow. As to muscles, you can see the comparative shadow on the pictures. The meat altogether makes a shadow lighter than the bone. Cartileges make less shadow than the bone, and sometimes they do not show at all. As to whether or not, when the cartileges are injured between the bones and the joint, it would necessarily show in any X-ray picture, you would know whether the position was correct of the cartileges from the picture; that is, if you knew the analysis of the picture and you would know if it was in a comparative position. As to whether it had mended or not showing in the picture, I do not know that I ever saw a case where the cartilege was injured in that way. Sometime- the cartilege does not show. You could tell from the picture. I would not have to guess about it if I know the anatomy. As to seeing one bone come up here and another bone come up there in a picture and being able to tell whether the cartilege was between, not being able to see it, the whole thing is a matter of professional opinion. It is true while you get a picture it is not like looking through glass. It is what I see. Comparative shadows is not all there is on an X-ray picture. There are projections of different structures; you mean by projection it makes a shadow in the picture. If you take the plates in a proper examination you can form an opinion which will be a professional opinion and make a diagnosis as to its condition. Whether I can see a man's nerves and see whether they are out of fix, if we were examining for a nerve condition, we examine to see whether there was any injury to the bone, to see whether it would affect the nerve. Answering your question if the nerves are injured, or not injured, you cannot tell it by looking at a man through an X-ray. Will say if I examine a shoulder and found the bones are in position, that there is no bone out of position, I would not say that the nerves are injured. You cannot see the nerves with an X-ray. I will say yes if the nerve is displaced you could
60 not tell it by an X-ray unless there are some bone displacements. You do not see the shadows of nerves. I would say that the nerve could not be displaced in that way unless there was some damage to the bone in the way you indicate. I do not think that it might be displaced at one time and the bones afterwards be in a normal position and the nerves not. As to us all thinking there was something wrong with the nerves in this man's shoulder joints we made an ordinary clinical examination and an X-ray examination. The symptoms to be explained were pain and stiffness. I found no bone displacement. There was a possibility then that there

might be an injury to the nerve. I expressed the opinion of a possibility of an injury to the nerve.

Redirect examination:

By Mr. Allen:

The witness is handed two X-ray pictures.

Those are the X-ray plates that I made of Mr. Renn's shoulder. This indicates the dates. This was made in April and those in May. I put those labels on there, that is my own marking, so that I could distinguish them; put there for that purpose. The result of a long continued injury and its effect upon the muscle a severe injury to the nerve, and would result in wasting and possibly paralysis. Take the case of Mr. Renn: If from my examination of Mr. Wrenn there had resulted an injury to a nerve from a fall that he had sustained, in my opinion the character of that injury would be slight, because he had slight symptoms; the symptoms were pain and stiffness. As to the outlook for an injury of that character to the nerve it is not very serious. It will get well. The treatment for it in my opinion is rest, and the second treatment sometimes we used massage, and sometimes we used liniments, and things of that kind. We also use considerable electric treatment in those places. As to the success I have had in the treatment of injuries of that character, the general re-
61 sult, neuritis is a tractable disease. It is a disease that can be treated successfully. Curable in most cases unless very severe. The neuritis that existed here from my examination of him I though was quite slight. Pain and stiffness the only *stiffness.* He had no wasting at that time. This was two months after that.

Recross-examination.

By Mr. Simms:

It had existed long enough to show—from January to April. The only symptoms that existed were pain and stiffness. Further symptoms would be wasting and paralysis and loss of sensibility in some cases. Loss of sensibility is not paralysis. Paralysis is a question of motion, and sensibility, is a question of feeling. They act hand in hand; if a man's arm is paralyzed, he has no motion and no sense of feeling. They run hand in hand. He may have disturbed feelings and emotion may be fairly good. Paralysis generally includes both. There are grades of neuritis without paralysis. Neuritis means inflammation of the nerves; and as to its being as painful a thing as you can have, it depends. Sometimes they are curable and sometimes they are not. I would say mild cases are curable and some severe cases are not.

Redirect examination.

By Mr. Allen:

When I speak of a severe case, I mean when there is a severe cases of wasting and atrophy of the muscles.

Dr. J. M. Burke.

Dr. J. M. BURKE, a witness for the defendant, having been duly sworn, deposes and says:

Direct examination.

By Mr. Allen:

I am a practicing physician of the State of Virginia and have been for 25 years.

The court holds that this witness is an expert.

62 I am chief surgeon for the defendant Seaboard Air Line Railway. I *have* occasion to examine Mr. J. T. Renn, the plaintiff in this case. The latter part of April, 1912, he came to me. The general superintendent sent Mr. Renn to me as having been an old and faithful employee, and willing to do something for him, etc., and he requested that I have an X-ray examination made of him, and of course, I always at that time sent my private work as well as railroad work, when it was at my home, to the best I could find. I knew that Dr. Hazen was the best, and he was sent to Dr. Hazen by me for the X-ray examination, and I looked at his shoulder joint, just made a physical examination of that and I found that he had stiffness and pain in his right shoulder. Of course, I did not express anything further to him until I sent him to Dr. Hazen, and I afterwards notified Mr. Renn that Dr. Hazen would send these plates, etc., and that he could find no crack or deformity and that it might be due to an injury to the nerves; and that is the last I have ever seen of Mr. Renn or heard of Mr. Renn, except the general superintendent afterwards wrote me a letter in which he said: When Mr. Renn came there he told me how he sustained this injury; that he had to fix a pump at Cochran the first part of January, and that he saw a freight train coming along, or that he was very anxious to get to Norlina that evening and he was running for the train and that he fell on his shoulder; and I asked him did the train strike him or did he strike the train. It is natural for a doctor to ask these things as I wanted to know how he fell and in what way. The only symptoms I found was just stiffness and pain in this right shoulder. I relied upon his statement as to the claim; I examined the shoulder with my hands to see that the bones were in position and they appeared to be in position, except that the stiffness in raising his arm. Neuritis means inflammation of the nerves. That in-

63 flammation of a nerve is a curable condition. Dr. Hazen expressed the treatment—massage. It depends entirely upon its cause; you have neuritis from various conditions; all kinds of things I would not like to go into. You give internal treatment—inside—what Dr. Hazen said, baking the arm or limb—it is sometimes called rheumatism. A great number of people call it that. But the doctors call that rheumatoid-arthritis, that is known as rheumatism, rheumatoid-arthritis. That can be caused or brought

about by exposure to the weather as well as neuritis; it is all injury to the nerves, alcoholism, all of those things. As to the tendency toward the two diseases of that charatcer is concerned in a man over 60 years of age who has a great deal of work out in the open at night and in cold weather, the tendency is to be continued; that is, more or less it will be a congestion for a little while and it will get better again. It is rather a continuous thing. It is considered simple thing unless a person gets so that they cannot use themselves. Exposure to the weather is the cause that produces it. It is more likely to produce it in a man over 60 years of age—the older you are, it is more likely to produce it. The effect of long continuous nerve injury of the muscles there would be positive wasting and eventually if continued without proper nutrition, etc., there would *would* be paralysis.

Cross-examination.

By Mr. Simms:

I do not swear that rheumatism and neuritis are one and the same thing; one would be the effect of the other. You can have per se neuritis, that is not rheumatism. Rheumatoid-arthitics is inflammation of the joint itself. That is not all that the big words means, it means more than that; when you have rheumatoid or arthritis, you are going to have fixation of the joint. It is a great deal more than ordinary rheumatism. I would hate like smoke to have a case of rheumatoid-arthritis. If I had neuritis, I would consider myself a poor doctor if I could not cure myself very quickly.

64 I want to make a distinction in all cases of neuritis that get better, the other conditions of rheumatoid-arthritis, it is very serious. I did not treat this man. As to being such a good doctor that I have gotten to be, chief surgeon of the Seaboard, all of the doctors selected me and presented me to the Seaboard. I have given all of my time practically to the Seaboard for the past five years, with the exceptions of a few medical conventions that I attended. A man may have neuritis, inflammation of the nerves, caused by exposure or by a fall. Answering your question or traumatism, as you doctors call it, violent injury and fall, I will say no, if I said a fall that would *would* not be traumatism. If a man takes carbolic acid he scarifies his mouth, but he does not hit him. I told the company he was suffering with an injury to the nerve of the shoulder. I have an exact copy of what I have said. I said to the general superintendent that this neuritis, or supposed to be neuritis, or injury to the nerve, may have been due to rheumatism, or to a fall, or 33 things I could mention, that it may be due to, but I wrote Mr. Renn a letter that I told him that this injury may be due to an injury to the nerve; as to whether I expressed an opinion that the man had an injury to the nerve, I said it could be caused from a fall. As to my expressing an opinion that he had an injury to his nerve, I did not to the company; I said to Mr. Renn it might be an injury to the nerve.

Redirect examination.

By Mr. Allen:

From my physical examination of him, I formed an opinion as to the extent of the injury to the nerve referred to in that letter. He complained of pain as well as immobility in his right shoulder joint, and making an external examination of his bones, it felt as though it was normal; and I sent it to Dr. Hazen to be more certain. I thought the old man may have fallen on his right shoulder and inflamed the nerve by reason of his fall. That is what I had reference to in that letter.

65 Recross-examination.

By Mr. Simms:

Answering your question *with* Dr. Hazen did not state to me that Mr. Renn's condition was due to an injury to the nerve, I will say no.

I stated in a letter to Mr. Renn the doctor states it was an injury to the nerve, but Dr. Hazen states he did not state that to me. I made this statement to Mr. Renn on May 10, 1912. It was right after Dr. Hazen made his examination and reported same to me. At that time I wrote to Mr. Renn that the doctor says that your condition is due to an injury to the nerve, that is exactly what I wrote him.

Redirect examination.

By Mr. Allen:

In writing that, I was evidently mistaken.

Dr. William Moncure.

Dr. WILLIAM MONCURE, a witness for the defendant, having been duly sworn, deposes and says:

Direct examination by Mr. Allen:

I practice medicine in Raleigh. My initial is W. Moncure, and a graduate of the University of Pennsylvania, and have been practicing medicine since 1903; after graduating I had three years' hospital practice in Philadelphia, and have been practicing medicine in Raleigh since 1906.

The court holds that the witness is an expert.

I am connected with Rex Hospital here—member of the staff. Have an X-ray machine there. I operate it; as to my experience in taking X-ray pictures, don't know exactly the number of pictures that I have taken, but the last four years we have been operating there and taking a number of pictures each week. I am not connected with the Seaboard Air Line Railway in any way. Mr. J. T. Renn came down to get an X-ray picture taken of a shoulder; I

made the picture. In doing that I took the clothing from
66 both shoulders; I took the picture of the right shoulder. I looked at both shoulders. I stood him up before me and looked at his shoulders. As to the condition I found his muscles to be in regarding wasting, I found no evidence of wasting or diminished size in the muscles on either side. They were equal. The muscles were round and normal outline in comparing one side with the other as far as the eye is concerned and feeling. Comparing the right and the left, they were even; that is, examining him by inspection. The muscles appeared to be normal. I took that X-ray picture and as result of it, I found that the bones of the shoulder were perfectly normal, no indication of any break or previous break, or any part of the bones being simply broken, like chips or bone that may occur; in my opinion the bones of his shoulder are in normal condition and normal relation to one another. I found no indication at all of any chips of bones; I made this examination at Mr. Renn's request. He never came back to see me after I made the X-ray. The effect on the muscles of long continued injury to the nerve would result in paralysis, wasting, shinking of the muscles. My opinion as to whether any injury to a nerve is curable, where the injury resulted in striking the shoulder upon the ground from a fall, without any displacement of the bone, and injury to the nerves from a fall on the shoulder without any injury to the bone, would of necessity be slight and therefore, the probability would be it was curable. The treatment is absolute rest, and after that occasionally general tonics, internal medication, and later on measures like electricity and massage. The symptoms of severe injury to a nerve in the shoulder would be both sensory and motor symptoms, a lack motion, paralysis with wasting and disturbances of the senses, and disturbances of nutrition of the part, and the skin and surrounding tissues. I found none of these indications in my examination of Mr. Renn.

67 Cross-examination.

By Mr. Simms:

As to observing stiffness he complained of stiffness and some little pain in raising his arm. Answering your question, if the muscle was strained it would not show in an X-ray picture unless the bones were displaced, will say I hardly know what a strained muscle is, not what you mean by it.

Redirect examination.

By Mr. Allen:

That is my plate.

The defendant rests.

Frank Parks.

FRANK PARKS, a witness for the plaintiff, having been recalled, deposes and says:

Redirect examination.

By Mr. Simms:

At the time Mr. Renn got hurt, there were no holes at the top of that tank on the east side at that time.

Recross-examination.

By Mr. Allen:

I left there in 1912, April or May, I forget which. I went there in August or September. I was not there in 1910 when they painted it. I do not know what the carpenters did.

Redirect examination.

By Mr. Simms:

I know there was no hole there where the carpenters worked.

J. T. Renn.

J. T. RENN, the plaintiff in this action, having been recalled deposes and says:

68 By Mr. Simms: I did not know of any path on the west side of that tank between that tank and the railroad track coming up from the pump house.

Dr. A. W. Goodwin.

Dr. A. W. GOODWIN, witness for the plaintiff having been duly sworn, deposes and says:

Direct examination.

By Mr. Simms:

I have been a practicing physician here in the city of Raleigh for 28 years. Graduated from the Bellevue Hospital and Medical College in New York.

It is admitted that the witness is an expert.

I saw Mr. J. T. Renn after his injury that is here complained of. I examined his right shoulder. I found at the time I examined him some stiffness, limited motion, tenderness on pressure or by manipulation, and seemed to me some slight elevation over the top of the shoulder; in other words, there seemed to be a tenderness of some of the muscles, or tissues over the shoulder. At the time I

did not examine Mr. Renn further. I told Mr. Renn he ought to have an X-ray photograph made, and I told him to have one made and I did not go any further into examination. I saw the picture made by Dr. Moncure, for a moment. I have not seen it closely. As to my opinion whether it shows any abnormal location of the bones, will say very slight, if any. The position of the bones is normal. Seemingly as to the condition as position to each other. There appears to be a thickening of this part of the clavicle. Could I ask Dr. Moncure as to the position of this man when this picture was taken? On his back, shoulder elevated, slightly upward, slightly oblique. It shows a little in this, chiefly in the different position, that is the only thing that I can see. No injury to the bone. As to that thickening, that might be pro[illegible]ed by chronic in-
69 flammation of the periost-um of the bone. I stated to Mr. Renn at the time I thought there was some injury to his shoulder. I was not permitted to make a diagnosis without the X-ray photograph or further examination.

Cross-examination.

By Mr. Allen:

He came back to me once after that. I looked at him superficially and told him that I could not relieve him and told him that it was [not] necessary to take any medical treatment unless he was going to have it looked after as he should. I wanted to see an X-ray picture. I wanted to know whether the bones in there were normal. I told him he would have to do that before I could make a diagnosis. I did not determine whether I could properly treat him or not, because I did not get this X-ray picture for the basis of my diagnosis. I see the other X-ray picture that you show me. This is not the same bone. That is part of the scapular. That is in a different position. This is the same position as Dr. Moncure took. That seems to show the slight elevation. That is the clavicle. That is the collar bone. There is some slight elevation that is supposed to be in that. Does not show any injury to the bone? No; an injury to the nerve does not set up a slight inflammation. The indications of that externally are pain, limited motion, some disturbances of the muscle. As to the internal indications, generally speaking, there are none, unless there is some blow, not to the deep nerves. Generally speaking, treatment of inflammation to the nerves, by the medical profession is successful, slight inflammation. After making a diagnosis, I know what to do, what to attempt to do. If I made a diagnosis with the X-ray, if I had made a true diagnosis, I would have known what to do. The X-ray would have been valuable in making the diagnosis. The indications were, and the symptoms and the history, all gave suggestions that there was an injury to the bone or cartileges. He complained of not being able to raise
70 his arm up. I have not treated him. I did not offer to remedy it. He did not return. I examined him in March after his injury. He stated to me that the injury was in January. I did not get the date. I saw him in March after the injury.

Redirect examination.

By Mr. Simms:

The cartileges may be injured without the bones themselves. If there is an injury to the periost-um, the membrane around the bone, that would not show in any X-ray picture, not unless it becomes ossified. These membranes can become bruised and injured. Inflammation of the nerve is a form of neuritis. As to whether sometimes you can cure that and sometimes you cannot, it depends upon the extent of the neuritis and the cause of it.

Recross-examination.

By Mr. Allen:

As to my diagnosing this as neuritis, I suggested this to him at the time, but I did not ever make a complete diagnosis; but he was suffering evidently from neuritis at the time. As to being his family physician, I treated his family sometime ago, and in the last eight months I have seen his daughter. I do not think I prescribed for him prior to this time.

Prior to that time I had been his family physician, and since that time I had treated his daughter for an injury to the foot.

Dr. W. C. Horton.

Dr. W. C. HORTON, a witness for the plaintiff, being duly sworn, deposes and says:

Direct examination.

By Mr. Simms:

I live in Raleigh and have lived here 12 years; am a regularly licensed physician under the laws of North Carolina and a
71 graduate of the College of Physicians and Surgeons of Baltimore; am a member of the Medical Society. Have been engaged in the practice of my profession under license for 18 years.

It is admitted that the witness is an expert.

I examined Mr. Renn, the plaintiff here. I examined his right shoulder, drooping condition of the shoulder; that is the scapula, muscular and ligamentous attachments were drooping; the right shoulder. There was a nodular feeling under the skin of the upper part or top of the shoulder, which at first examination felt like a break of the clavicle or collar bone. I was not satisfied with that external examination, so I made an X-ray picture of him. This X-ray picture proved it to be not a break in the c-avicle, but a loosing of the acromion-clavicular joint, allowing the clavic*al* to stand up higher than it should, and the scapula, or the shoulder blade, to droop. It is between the acromion clavicular—that is the joint, where the collar bone comes around and joins with the acromion process of the scapular. That process is where it comes up and

forms a protection for the shoulder joint, and this collar bone or clavicle has a little facie on that acromion process, and has a whirling ligament between those joints, which serves as a pad, or protection betwen the bones, and that joint is protected by several ligaments—the acromion clavicular ligament and several other ligaments. I do not know the name of all of them that form a pad around that joint that hold it in position, and evidently there was some tearing of those ligaments, breaking loose of those ligaments, that allowed the line of continuity, or the proper union, to be broken without the breaking of any bones. The tearing of the ligaments would not show in an X-ray picture, but the loss of proper position of the bones and their continuous relation would show. The cartileges do not show in an X-ray, and if an imperfect condition or displacement of the cartileges had existed you could not see
72 it. In my opinion I think the shoulder either from direct violence against the shoulder or from other violence, I mean such as a fall, will be torn loose from some of the ligaments binding the acromion clavicular joint and cause the clavicle to rear up, as it were, and the shoulder blade allowing to droop, and not permitting the proper movements of the arm and shoulder. The cause of the drooping the arm has not its proper play. As to whether his arm did have proper play, it cannot be carried over his head without excruciating pain. I have my picture with me.

Upon request the witness exhibits and explains this picture to the jury.

This is the clavicle. There is the acromion process. Here is the acromion. That is a ball and socket joint; there is where the union or joint should be, and that is where it is. Now this picture was taken with an effort on my part to try to bring the joint in proper position. I forced the shoulder up, forced the scapular up, and tried to take it as much as possible in a proper position. I mean by that you throw the scapular up in a proper position to the clavicle and that shows almost a good position. It can be forced up, but it won't stay. Now here is a very dim picture that I took with the shoulder lying. You can see that if you look very closely. I can see it and Dr. Burke can see it. There is a position with the shoulder and the clavicle allowed to droop. It is not a good exposure. You can see the top part of the clavicle coming a way up here with the scapular with the acromion process drooping down. I thing that is out of line three-eighths or one-half an inch—three-eighths I would say. I will take that man's clothes off and demonstrate upon his shoulder if you will permit me.

The plaintiff strips from his waist up before the jury.

Stand up straight now, turn loose; I am not going to hurt you. Let every muscle perfectly loose. (Illustrates.) That is straining the muscles of the shoulder up to the proper position, even though he turns it loose absolutely.

73 Cross-examination.

By Mr. Allen:

I found Mr. Renn's left arm all right. The muscles of the right arm are larger than those on the left. I see no indications of atrophy of the muscles of the right arm. I examined the plates that Dr. Moncure had. In so far as I know it is an X-ray of the same shoulder. That corresponds with my X-ray, in which I have forced the shoulder. I mean that conforms to my best plate. As to my other plates being very perfect as an X-ray picture, it is perfect enough for me to see. Nothing like as perfect as this one. It is not as perfect an X-ray as this one. This picture is taken from the rear. That shows the bones. It was taken from the same position as mine was taken. That is a better plate than the second plate I showed. It is plainer. I do not know about its being a better plate. You can see it. As to showing on there where there is any abnormality of any kind, well, the line of continuity should be more correct than it is there. That shoulder is drooping. He has not a normal shoulder in that picture. It is not a normal shoulder from this picture. As to its being a normal shoulder, from this picture this picture is nearer the normal position than any other. I do not know whether it was forced up or whether it was lying in the proper position to show it, but it shows the line of continuity better than any of the other pictures. That does not show any deformity in the bone or the shoulder. I would consider that a normal picture, and in this picture I forced the shoulder up as far as I could get it, forced it up with my hands as far as I could get it. I do not know about pushing it further than it was in this picture. I did not have anything to do with this picture. It does not appear to be any higher in this picture than in this picture. In fact, that shoulder there looks as if it was forced a little higher, because the line marking the muscle and the skin is more at right angle. In examining him I found that his left shoulder drooped more than his right. That is the well shoulder. The whole side drooped.

74 The left shoulder drooped more than the right, that was in the curvature of the spine; he was bent to one side. Any long continued injury to the nerve of the shoulder would result in atrophy of the muscle if the injury was sufficient to destroy the motion in the muscles. I did not see any indication of atrophy in his right shoulder. That would not indicate any serious injury to the nerve, no injury sufficient to destroy the action of the muscle. You can have an injury to the nerve. You see a nerve can be injured and not killed. An injury occurring three years ago that would show an atrophy of the muscle. The muscle there is not destroyed, and that could not have been that kind of an injury. I would not say in my opinion if there was any injury there over three years ago that that injured nerve had become normal or well. As to my opinion whether that is true or not, as there is no indication of wasting, as I said before a nerve can be injured and not destroyed. I mean a minor injury. As to an injury which con-

tinued three years showing up on the arm if the injury was sufficient to kill the nerve, if the injury was of sufficient gravity to kill the motion of the muscle, it would cause atrophy in the muscle. If it was a severe injury to the nerve, the muscle would not necessarily atrophy; a muscle atrophy is because you do not use the muscle. As to an injury to the nerve being generally curable it depends upon whether the cause of the injury is removed. If there is a constant pressure on the nerve you cannot cure that. In my X-ray examination I did not find any indication of fracture, or chipping of the bone, of any break of the bone of any character, or anything about the bone that would cause a pressure on the nerve.

As to my opinion that any injury to the nerve which resulted from this fall must have been of a minor character, there not being any pressure upon the nerve, I am not prepared to say whether it was of minor character. It could have been of grave character, and gradually recovered. It could have gone back. As to whether very frequently that condition of the nerve is constitutional not in
75 the sense of a traumatic injury. Will say you can have local neuritis from pressure or temporary pressure, or you can have neuritis from a generally nervous condition. When the pressure is removed the neuritis is cured up if it is due to pressure. You can have neuritis from exposure to the weather. That is sometimes mistaken for rheumatism or called rheumatism by the laity.

Redirect examination.

By Mr. Simms:

A man's right arm is usually larger than his left if he is right-handed. Especially if he is a man engaged in manual labor, working with tools and plumbing. Although an injury to the nerve may be such that if a man did not keep on trying to use his muscles the muscles would atrophy. Nevertheless if he kept trying to use it the muscle would not shrink away, although it might shrink away. By atrophy I mean shrinking away of the muscles. You see the biceps are here. (Indicates.) This is controlled by the deltoid, and a man can keep up the usefulness of the biceps without the use of the shoulder; the shoulder might remain immobile and use his biceps, the shoulder can be absolutely fixed and then keep the biceps in proper strength. The biceps are these muscles here in the arm. (Indicates.) As to his ability to use his arm above his head, this way, it is impossible to get it over his head as far as I have found. I have tried it with him and tried to lift it myself. Tried to get him to do it unaware, that is without his knowledge of what my effort was for. It was painful to him and he carries his body over. (Illustrates.) That will throw him if you strain him up.

Recross-examination.

By Mr. Allen:

You can carry his arm this high nearly out straight before you notice that he has his body bent and his spine curved. I have tried

to throw it right up. I say that the muscles of the shoulder and the condition of the shoulder has no effect on the biceps, not
76 the keeping of the biceps in trim unless it destroys the action of the biceps. You can lift with the biceps. It has no effect upon the triceps. When you hold it up to drink water that brings in the action of the shoulder. If a man can drink water with his right hand it shows that the shoulder is not entirely immobile. As to whether if a man can sit in this chair in that position would indicate that there was mobility of the shoulder. (Illustrates.) That would indicate that you can get the shoulder at right angle. You are leaning forward. That would indicate less immobility as long as you do not bring it at right angles. He can sit like this (indicating), because I have carried it up that far. As to his using his arm in this way (illustrates) it is impaired in so far as the deltoid muscles are brought into motion. You can do this (illustrates) and keep your shoulder perfectly fixed. As far as these muscles here are concerned he is not affected. The arm is not perfectly useless. He can use his arm in that way as far as I can tell. I have not treated Mr. Renn. He has not asked me to treat him. He has done nothing but ask me to make this X-ray examination. He did not tell me when I made the first one that he had a suit against the railroad company. After I examined him, after I was summoned to court, I asked him to come and let me make the second one. I was convinced myself but I did not know whether you would be. He did not ask me to treat him.

Mr. Allen, counsel for defendant, asks that the doctors subpœnaed here by the defendant be allowed to examine the plaintiff, J. T. Renn.

This is objected to by Mr. Simms, counsel for the plaintiff, on the ground that they have just done so while he was stripped before the jury.

C. A. Maynard.

C. A. MAYNARD, a witness for the plaintiff, having been duly sworn, deposes and says:

77 Direct examination.

By Mr. Simms:

I live here in Raleigh and work for the Seaboard; working for the Seaboard on the 14th of January, 1912, when Mr. Renn got hurt. I was wrecking car foreman. I did not see him get hurt. I saw the place where he said he got hurt. I heard him describe the place that he was hurt. I have seen the place before that time. As to the condition, well, there was ice around the tank. Come off a slope all around the tank, something like that, and behind I would call it on the east side of the tank; the railroad track ran north between here and Richmond, and on the east side, all of the way around there was a slope of ice all around the tank, two or three feet thick, which ran off the tank; that was on the east side

of the tank and all around the tank, except on the side the track was on, there was ice all around the tank. I had been on the siding there before night. I went there to pick up a car, and picked it up, and sixty-six (66) as it was then, it was running late, and we waited until after dark and I noticed where they put water in the tank for the trains, it ran over and there was a great deal of water between the pass track and the main line; there was ice over there. As to whether it snowed in the late afternoon or whether at the time Mr. Renn was there it was snowing, it seems to me it snowed that night after dark. During the day, while I was there, I seen the ice at the place where he said he fell. There was a path around the east and south side of the tank leading around between the tank and the tool house. As to its being the usual path, I cannot say. It was the only path. It was the only path without going down the track that I know of. I have been there in the summer and in the winter time and there was a path back of the tank. I cannot say that I saw any path between the tank and railroad track at all. I saw Mr. Renn after he got hurt that night. The first I saw of
Mr. Renn at all, was when he came to the back of my shanty
78 car and I was at the steps when we started off; I went to the steps and Mr. Renn and Mr. Parks were out there and Mr. Renn seemed not to be getting along very well and I ran out and helped him in. He ordered in our car to Grandy, Virginia, and I had a car to pick up there and I picked it up and went back in the car with him; he stayed in the shanty car by the *far*, and I went back in the car with him and went from there to Shelton and he wanted some fittings for the pump and wanted me to go down there to get them for him, to go with him, and I said, you will have to show me what you want and I went down there with him, and I broke open a barrel and got them out and got back on the car with him and went from there to Norlina and there he got off. His condition while in the car—well, Mr. Renn was complaining of his shoulder. He claimed that he was suffering right smart pain. I have been working for the company eleven years and I knew Mr. Renn before he went to work for the company twelve or thirteen years. I know his general character; it is good. I have seen him since he got hurt. His condition with respect to his shoulder, he has been complaining along at times. Every time I would see him I would hear him say something about it.

Cross-examination.

By Mr. Allen:

I did not know that he drew $90 a month from the Seaboard for thirteen months after that, but I knew he was working for the Seaboard and continued to work for them; I do not *not* know much about the duties of the pump repairer. It takes a pretty good man to fill it. The worst weather is when he has the most trouble. As to the number of times I have been at Cochran, I had laid there in the pass track at night and slept and have laid there in the summer time, when it was too hot to sleep, and have gone and slept under

the tank; I did not live there. I do not know what time I
79 got to Cochran from that wreck that evening. It was not
after dark when I came back and Mr. Renn got on my car. I did not get off my train then. I did not get off on the way up. I will say that I had to pick up a car coming back, and 66 was late and we could not get by. I did not stop on the way to the wreck. I stopped coming back; that is, when Mr. Renn got on. As soon as 66 came by we pulled out in a few minutes. I had been around the tank before dark. There is a slope from the pump house to the tank; it is something like 200 yards. Down there it is a fill about 18 or 20 feet up to the track. I know where the over-head bridge is, the slope commences there and slopes on down to the pond. On the east side of the over-head bridge, there is a slope there a little ways and then there is a drain and then there is a tank and then down here is the pump house. It is something like this: There is a drain between the overhead bridge and the tank. I suppose the tool house is not over 20 feet from the tank, not much more than that. I could not say for certain. Going to the east from the tank there is a slope. I have never seen that tank overflow. If the tank overflows, I think I would know which way the water would run if it hit the ground. It would be bound to run down hill, and I know the slope. It would not all run towards the pump house. Tank is north of the depot—that little knoll there—if I remember. That tank is set up on a concrete base; I never noticed the places cut in the back of the tank where the water overflows to the east. I do not remember that I have seen a place cut in the top of the tank in a V shape. I have been up on top, it is a good climb. As to whether it is a good climb to climb up *into* and then into this tank, I have never done that. You have to do that to fix the valve in the tank. You have to do that to get to it. I could not say that I have ever noticed the air valve on any of those tanks. As to water running out when the engine is taking water, there is an air valve that comes down under
there, which runs up and goes back to give air when you
80 pull the rope to raise the valve if you have not got one, I
notice it will jerk you like that. (Illustrates.) Sometimes they will jerk you with them. It is a small pipe, about an inch pipe, and water runs out of that continuously while they are getting water. In getting water they pull the goose neck down. There is air in the tank of the engine, and when you put in the water, that bubbles up, unless you are careful. The whole weight of the water in the tank is on it, and it will bubble up and run over the side of the tank unless you watch it closely. That takes time; very few of them do that, as it will delay trains. When you finish taking water, you turn the goose neck up, and some little water runs out, unless you let it drain. You expect to find water around the water tank; you usually find water around the water tank, and in very cold weather, that water is ice. I would say that was terribly cold weather. I was in it; it was the worst weather I ever saw. I left here the night it started to snow and I do not know how long I was out; and nearly froze that night. As to the effect this bad cold weather had on our engine, our steam gauge froze up. I do not say it did that

night. Anyway, it was very cold. I could not say that the night of January 14, was the coldest night that we had during that spell. There was ice all around the station at Cochran. Ice on the railroad embankment; ice going down that path to the pump house, and ice on the pump house pond. I went to the pump house pond and looked at the valve that was bursted. There was thick ice there, of course, that was not slick ice, it was rough, where you had been walking. It was not slick there, it was rough where you had been walking, where the foot prints were; there was snow on the ground and had this sheet of ice on top, and it would break through, because I went down there. If your weight would not break through, you would naturally skate on it. I did not run any there. I was careful where I walked. I have not been out, but only went
81 out when I had to. I had to go out and get up a car, and after I did that I did not go out. We were right opposite the water tank. There is a main line and pass track, three tracks there. We were on the middle track. I do not think Mr. Renn told me that he fell between the main track and the pass track. I could not tell you where he told me he fell. He told me that he fell by the water tank. I could not tell you what point around the water tank he told me.

John Riddle.

JOHN RIDDLE, a witness for the plaintiff, having been duly sworn, deposes and says:

Direct examination.

By Mr. Simms:

I live in Raleigh and know Mr. Renn; have been knowing him ever since he has been here. Do not know how long that is. I know his general character, and it is good. I know Mr. Parks. I know when he came to Raleigh and took the Raleigh yard; he stayed here about a year. I have known him about six years. I know his general character; it is good.

R. H. Hester.

R. H. HESTER, a witness for the plaintiff, having been duly sworn, deposes and says:

Direct examination.

By Mr. Simms:

I live in Raleigh and know Mr. J. T. Renn, and have known him about ten years. I know his general character; it is good. I know Mr. Frank Parks, and have known him for about one and one-half years. I know his general character; it is good.

Cross-examination.

By Mr. Allen:

I knew Mr. Parks when he was here several years ago.

82 *D. H. Mangum.*

D. H. MANGUM, a witness for the plaintiff, having been duly sworn, deposes and says:

Direct examination.

By Mr. Simms:

I live in Raleigh and know Mr. Renn, and have known him something like 25 years. Insofar as I know, his general character is all right. I do not know Mr. Parks.

J. J. Mann.

J. J. MANN, a witness for the plaintiff, having been duly sworn, deposes and says:

Direct examination.

By Mr. Simms:

I live in Raleigh and am employed as baggage master on the Seaboard. I know Mr. Renn and have known him 10 or 12 years. I know his general character; it is good. I saw him a day or two after he got hurt at Norlina, he seemed to be suffering some with his right shoulder, and he had it in a sling, made out of a handkerchief and seemed to be suffering right much. I did not talk with him at that time. I was busy; he came in and asked me to write a telegram to the superintendent that he was going home, that he was sick, and I wrote the telegram. I marked it to the superintendent, copy to the division engineer and put it off at Ridgeway. He said that he was unable to work. I saw him after that. He was toting his arm up and complaining of his shoulder here.

Cross-examination.

By Mr. Allen:

He kept on working for the Seaboard. I suppose he was drawing his pay. He would not work if he had not. The way he told me
83 that he got hurt, he said that he fell at Cochran, just as he was going on the track, slipped on the ice and fell. I do not remember that he said he was running to catch the train. He said that he was going to catch the train.

The plaintiff rests.

J. T. Renn.

J. T. RENN, the plaintiff in this action, having been recalled, deposes and says:

Recross-examination.

By Mr. Allen:

Plaintiff identified thirteen salary checks which he received from the Seaboard Air Line from February, 1912, to March 5, 1913. The difference between the amount of those checks and $90.00, was deduction for commissary and other deductions.

Dr. C. M. Hazen.

Dr. C. M. HAZEN, a witness for the defendant, having been recalled, deposes and says:

Redirect examination.

By Mr. Allen:

I looked at Mr. Renn while his clothes were off. As to whether there is any abnormality, his right shoulder is normal, I am sure. I looked at it, I did not feel it. In comparison with the left shoulder, the only difference is that the muscle of the right shoulder is larger than the left. The deltoid muscle. There is nothing to indicate any atrophy. I would say that there has been no injury that would affect the fidelity of the muscle. When I made these X-ray pictures I placed Mr. Renn in two positions from front to back, and the other from back to front. I left his shoulder lay in normal position on the table, without manipulation. That is true in each of the pictures that I took. From examining this in my opinion seems to
84 be a normal position; that does not indicate any injury to the bone or periosteum, and no displacement. As far as that picture shows, there is nothing to interfere with the nerve at all.

Recross-examination.

By Mr. Simms:

As to whether you can see the periosteum at all in that picture, you can see where it would—— No; the periosteum does not show. The periosteum is the covering of the bone. That is exactly what the word means. It is a thick membrane that gives nutrition to the bone. It is quite thin, probably not over a small fraction of an inch, about as thick as a sheet of paper, probably a little thicker than that.

Redirect examination.

By Mr. Allen:

I could tell from my examination there was no periostitis, that

means inflammation of the covering of the bone. There was nothing to indicate any injury to the covering of the bone.

Recross-examination.

By Mr. Simms:

If the periosteum was inflamed, you could not see it with an X-ray? The only way to see it would be to lay bare the bone.

Dr. William Moncure.

Dr. WILLIAM MONCURE, witness for the defendant, having been recalled, deposes and says:

Redirect examination.

By Mr. Allen:

I looked at Mr. Renn's shoulder. In my opinion, his right shoulder appeared to be normal in its outline, or contour. As far as the muscle is concerned, there is nothing to indicate any
85 atrophy. The right shoulder may be a little higher. There is nothing there to indicate any parting of the bones in the shoulder. In taking this X-ray picture, I placed Mr. Renn upon his back lying on the table. I did not push his shoulder or arm up, just told him to lie naturally on the table. That does not show any parting of the bones or abnormality in any respect. That little shadow around the edge of the bones that was pointed out to the jury by Dr. Goodwin, it was a little thicker. The end of the bone is flat, and if you take the broad side, it is wider, and in a posterior position, it is narrow. That is normal in the position he was in on his back. I did not notice any atrophy at all of the muscles in Mr. Renn's right arm, his right arm seemed to be larger, a little larger than his left. I could form an opinion as to whether or not there was any periostitis from the examination that I made. From my X-ray examination I would say there was not any periostitis.

Dr. J. M. Burke.

Dr. J. M. BURKE, a witness for the defendant, having been recalled, deposes and says:

Redirect examination.

By Mr. Allen:

The Seaboard has a surgeon at Norlina. He examines and treats employees of the railroad company. He is there subject to be called upon by employees of the railroad. I looked at Mr. Renn; I examined him while he was standing up there. In my opinion, the right shoulder is absolutely normal in a right handed man. No parting of the bones. As to dropping of the shoulder, the left is dropped, but a man that uses his right arm there is an atrophy of the left arm muscle; there is nothing there that I could see to indicate a

long continuous injury to the nerve; none I could see. none I could feel at all. The condition of the deltoid muscle is
86 normal. As I say, everything appeared normal in a right handed man from looking and external manipulation.

Plaintiff rests.

Defendant rests.

Defendant renews motion for judgment of nonsuit at the conclusion of all the evidence and moves to dismiss the action upon the ground that plaintiff failed to bring his action for injuries sustained while he was employed by the defendant in interstate commerce which arises under the Act of Congress of April 22, 1908, known as the Federal employers' Liability Act, within two years from the date of the cause of action accrued as required by Section 6 of said act.

Motion overruled, and defendant excepts.

Exception No. 17.

Defendant's Requests for Instruction.

NORTH CAROLINA,
Wake County:

Superior Court, June Term, 1915.

(Title of Cause.)

The defendant requests the court to instruct the jury as follows:

1. The court charges you that if you believe the evidence in this cause, the plaintiff was not injured by any negligence on the part of the defendant and you will answer the first issue "No."

The court refused to give this instruction, and defendant excepts.

Exception No. 18.

2. The court charges you that upon all the evidence in this case, the plaintiff assumed the risk of injury from falling on ice at the time and place testified to by the plaintiff, and you will answer the issue of assumption of risk "Yes."

87 The court gave the foregoing instruction as it appears in the charge to the jury. To the refusal to give this instruction as requested, defendant excepts.

Exception No. 19.

3. If you do not answer the issue of assumption of risk "Yes," and do answer the issue of negligence "Yes," then the court instructs you that the plaintiff, by his own negligence, contributed to his injury, and you will answer the issue of contributory negligence "Yes."

The court gave the foregoing instruction as it appears in the charge to the jury. To the refusal to give this instruction as requested, defendant excepts.

Exception No. 20.

7½. The court instructs you upon all the evidence in this case to answer the sixth issue "Yes."

The court gave the foregoing instruction as it appears in the charge to the jury. To the refusal to give this instruction as requested, defendant excepts.

Exception No. 21.

8. A railroad company is not negligent in omitting to clear snow and ice from the ground along side its track, and if the plaintiff slipped on such snow or ice, you will answer the first issue "No."

The court gave the foregoing instruction as it appears in the charge to the jury. To the refusal to give this instruction as requested, defendant excepts.

Exception No. 22.

11. There is no evidence that the injuries sustained by the plaintiff are permanent and you cannot consider permanent injury in assessing the damages in this case.

88 The Court refused to give this instruction except as appears in the general charge, and defendant excepts.

Exception No. 23.

Judge's Charge.

NORTH CAROLINA,
Wake County:

Superior Court, June Term, 1915.

(Title of Cause.)

Gentlemen of the Jury: This is an action brought by J. T. Renn against the Seaboard Air Line Railway to recover damages for an injury alleged to have been inflicted on him by the defendant on the 14th day of January, 1912.

It is alleged in the complaint that the defendant was at that time engaged in interstate commerce, and that the plaintiff was in the employment of the defendant, at that time, as pump repairer, working over the line of the defendant extending from Raleigh, N. C., to Virginia and Portsmouth, and on the day mentioned in the complaint that he was engaged in services as pump repairer, and as such was engaged in interstate commerce, or was one of the instrumentalities of such commerce, it being alleged that the defendant company was a carrier engaged in interstate commerce, extending through the States of North Carolina and Virginia, as well as other States. That on that date he was sent from Raleigh to Cochran, Va., to repair a pump of the defendant, which was used for pumping water into the tank located at that place, from which the trains of the defendant obtained water—the engines obtained water. That when he arrived about dark he undertook to repair the pump and found that he needed a fitting or flange or valve which was not obtainable there, and which he knew or thought he could get at Skelton, in Virginia, and undertook to go there, a few miles away from Cochran, and bring back the flange or fitting.

89 In order to do so, he undertook to go upon a train, a work train of the defendant going in that direction, and in coming along the usual path from the pump house, passed the water tank of the defendant at Cochran, to get upon the train, he slipped and fell upon ice which had accumulated upon the said path as it went up to the railroad track, and was injured.

That there had been a light snow, which had covered the ice, and that by reason of that he did not detect that there was ice along the path, and in the path over which he was going.

It is further alleged that the defendant had carelessly and negligently caused and permitted or allowed water to be poured or spilled upon the ground at said place and become frozen, and thereby covering the ground for a considerable space with a sheet of ice, and it had negligently permitted and allowed the said ice to be and remain at the said place and become hidden by snow, and thereby caused a highly dangerous condition to exist, and that the said condition and place was highly dangerous and perilous, and the defendant has negligently failed to warn the plaintiff in any manner of said danger, and on account of the negligence of the defendant in the particulars aforesaid, the plaintiff, while proceeding along said path, slipped on the ice and fell and was injured.

Now, the defendant, answering the complaint, admits that the plaintiff was a resident of Wake County, North Carolina, as alleged in the complaint. That the defendant is an interstate corporation, as alleged in the complaint and denies all of the allegations of negligence contained in the complaint.

And for a further defense, the defendant alleges that if the plaintiff was injured, such injury was caused by his own negligence in failing to exercise the care of a prudent man under the circumstances in his hurriedly walking over snow and ice, and that is plead in bar of the plaintiff's recovery.

90 The defendant pleads as a further defense that if the plaintiff was injured, as alleged, the risk of injury or falling on ice and snow on the ground was one of the risks ordinarily incident to the plaintiff's employment, and he assumed the risk of injury therefrom, and the assumption of risk of the plaintiff is pleaded in bar of his recovery in this action.

The defendant pleads in connection with the plea of assumption of risk that the plaintiff knew the condition of the ground at that locality, and apprehended the danger incident thereto, if there was any, that he knew and apprehended this danger, if there was any.

And so, under these allegations and denials, certain issues are submitted to you:

1. Was the plaintiff injured by the negligence of the defendant?
2. Did the plaintiff assume the risk of injury?
3. Did plaintiff, by his own negligence, contribute to his injury?
4. What damages, if any, is plaintiff entitled to recover?
5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and was the plaintiff employed by the defendant in such commerce?

6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed?

Defendant did not tender any issue as to whether plaintiff's cause of action was barred by the statute nor except to the failure to submit such a one and none was submitted the answer to which would show whether it was or was not barred. Mere pleading of statute not sufficient.

I have permitted the defendant to file an answer to an amendment that I permitted the plaintiff to make to his complaint.

That is not in yet, but as I understand, the defendant will set up the plea of the statute of limitations, and, consequently, I have submitted this issue.

91 Now, you will note, gentlemen, that this is an action in negligence, and that it is being tried under the Federal Employers' Liability Act. I thought I had that act here, gentlemen, but do not see it. Yes; here it is:

That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Now, to establish actionable negligence, the plaintiff is required to show by the greater weight of the evidence that there has been a failure to exercise proper care on the part of the defendant in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury.

The term proximate cause of an injury is defined to be that which produces the result in continuous sequence, and without which it would not occur; otherwise, defined as the real, efficient cause of an injury, and one from which no man of ordinary prudence could for-see that such result was probable under all of the facts as they existed.

92 The negligence alleged here is that the defendant permitted water to be poured out upon the ground upon its right of way, to accumulate upon its path, which the plaintiff alleged was the usual method of passing from the pump house to the railroad track and to the depot; that it negligently permitted it to remain there, and so remaining it constituted a serious source of

danger to persons using it coming from the pump house on the defendant's right of way around the tank and across the track.

And that the plaintiff was an employee of the defendant engaged in interstate commerce at that time, and had been down to repair the pump, and was using that path in performance of his duty in coming from the pump house to the track for the purpose of taking a train to secure the flange union, which was necessary for him to have in order to repair the pump.

Now, the Supreme Court of the United States has laid down this rule: That the employer is not a guarantor of the safety of the place of work or of the machinery and appliance of the work to be done by the employee. (The extent of its duty to its employee is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workman.)

To the foregoing charge in parenthesis, defendant excepts.

Exception No. 24.

Now, the plaintiff alleges that that was the duty of the defendant with reference to this path, and that it failed to perform this duty, and its failure to perform it constituted negligence, and that this negligence was the proximate cause of his slipping and falling and injuring himself.

(If the evidence satisfies you by its greater weight that the defendant failed in the performance of this duty, and by reason of such failure permitted ice to accumulate upon a path which was the usual path traveled by its employees to and from the
93 pump house to the track, and by reason of such failure, and as a proximate cause thereof, the plaintiff slipped and fell and injured himself, then your answer to this first issue would be "Yes"; unless you are so satisfied, your answer to it would be "No.")

To the foregoing charge in parenthesis, defendant excepts.

Exception No. 25.

Now, the plaintiff contends that the defendant was negligent in that it failed to furnish the plaintiff a safe place to work, and that it carelessly and negligently permitted ice to be formed and remain upon the ground near the defendant's water tank at Cochran, Va., and upon the usual path way which it was necessary for the plaintiff to use and which he was using in the discharge of his duties and allowed the same to be and remain smooth and slick and highly dangerous, and negligently failed to give the plaintiff any knowledge, notice or warning of any kind about the condition and existence of the same, and negligently caused the plaintiff to traverse the same in the performance of his duties to the defendant.

The defendant, on the other hand, contends that he was not in the path that was usually made use of by its employees, that he had gone around the tank in a different direction from the path that he claims to have been in and was at a place where he had no reason to suppose the defendant would think that he would go. That at the time the whole country was covered with ice in that section. That it was the bitterest winter that had ever been known in the memory of men

who had been living there some 18 or 20 years, and that he slipped and fell upon ice that was not in the path, and thereby injured himself.

Now, unless he was in a path, and the evidence satisfies you by its greater weight that he was in the path usually traveled by the employees of the defendant in going from the pump to the
94 railroad and across it, then you would answer this first issue "No," because the defendant owed no duty to exercise reasonable care to clean off and to prevent the accumulation of ice or to remove it from any other portion of its track or ground than the path.

So that before you proceed with the consideration of this evidence, you will determine in the first place whether the plaintiff was in the path usually traveled by the employees of the defendant at that point.

If the evidence does not satisfy you by its greater weight that he was, then you would stop there and answer this first issue "No," but if the evidence does satisfy you that he was traveling that path, then you would proceed.

(Your next inquiry would be whether or not there was an accumulation of ice in that path, and upon that proposition the burden is still upon the plaintiff to satisfy you by the greater weight of the evidence of the truth of his contention. He says that there was an accumulation of ice there, that in pumping the water into the tank, the tank had been allowed to overflow, and that the ice was there three feet all around the tank and extending out some distance, and extending into this path; that it had remained there for some time, I believe one of the witnesses said that he saw it overflowing that day; that the wreather was so cold that sometimes the water would freeze in falling; that the ice on the pond from which the water was pumped was some 12 or 15 inches thick, and the weather was bitter cold.)

To the foregoing charge in parenthesis, defendant excepts.

Exception No. 26.

Your inquiry is whether or not there was ice upon the path—the usual path traveled by the defendant's employees. Unless the evidence satisfies you by its greater weight that there was ice there, then that would end the case, and you would answer the first issue "No," but if you are satisfied by the greater weight of the
95 evidence that there was ice along this path as it started up to the railroad track, then you would proceed to inquire whether or not the railroad company had exercised ordinary care and prudence to the end that the place over which the plaintiff had to pass in the performance of his duty, if you find that he had to pass over that place, as alleged by him, in the performance of his duty, had been made safe by the defendant.

(Now, the plaintiff contends that there was no reason why in the exercise of ordinary care the defendant might not have made that place safe for the movement of its employees; that it is in testimony that they cut the ice away in approaching the depot a short distance off, so that people having business with the agent, or passengers

taking or leaving the train, could get away from the depot in the open place from which the ice had been cut. That the defendant had present that day a section force which could have been utilized to open this path and cut the ice away. That it had employees there connected with the work train, which had been there for some time during that evening, that could have been utilized for the purpose of opening this path and removing the ice, which the plaintiff alleges had accumulated there, and it failed to exercise the care, reasonable care and prudence which I have told you it was its duty to exercise in order to make a safe place for its employees at that time along that path.)

To the foregoing charge in parentheses, defendant excepts. Exception No. 27.

Exception No. 27.

(The plaintiff contends that this accumulation of ice was caused, not by the general weather conditions that prevailed, but in a large part, if not entirely, by the failure of the pumper to so regulate the pumping of the water as to keep it from running out of the tank,
and that by failure to exercise proper care he had caused the
96 tank to overflow, and that the water had fallen down around
it and had frozen, and that near the tank and around it on all sides of it the ice was about three feet deep, and extended out into this path.)

To the foregoing charge in parentheses, defendant excepts. Exception No. 28.

Exception No. 28.

Now, these are questions for you, gentlemen. The plaintiff contending that he was using the usual path; the defendant contending that he was not using a path that was used by employees, but undertook to go over a way that was not a path, and over a way that the railroad company was under no duty to keep open from ice. The defendant contending, too, that the ice, if there was ice upon the ground over which the plaintiff was going, was the result of the general weather conditions and not of water that came out of the tank, the defendant's evidence being that that flow, if any, would not have been accumulated in or around the path.

You will take all of this evidence that has been offered on both sides, all of the contentions of counsel, and give them a fair consideration, and say what the facts are.

(If, as I said before, the evidence satisfies you by its greater weight, the burden being upon the plaintiff, of the truth of the plaintiff's contentions, as I have recited them, you will answer it "Yes.")

To the foregoing charge in parentheses, defendant excepts. Exception No. 29.

Exception No. 29.

If you answer it "Yes," you will proceed. If you answer it "No," you need not proceed further, as that will end the case, because if the plaintiff was not injured by the negligence of the defendant,
then the plaintiff has no cause of action against the defendant.
97 If you answer it "Yes," then you proceed to the second issue: "Did the plaintiff assume the risk of injury?"

Upon that issue the burden is upon the defendant to satisfy you by the greater weight of the evidence of the truth of its contention. The defendant has, however, the right not only to rely upon the evidence offered by the defendant, but upon all of the evidence, and have you consider it all in determining your answer to this issue, and it becomes material for me to charge you as to the character of risk assumed by the plaintiff. The Supreme Court of the United States has laid down this rule, and uses this language in a recent case:

"Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he became aware of the defects and the risks arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

Now, the defendant contends if this ice was on the path, as the plaintiff contends, that the plaintiff was familiar with the premises; that he had been there frequently before in the discharge of his duties as pump repairer; that he knew of the weather conditions there that night; that he knew that the weather condition was intensely cold; that it had been snowing off and on for some 20 days and more, and it was sleeting and freezing, and that the
98 condition of the ice in the path, if it was there as contended by the plaintiff, was a thing that he could see and know and appreciate, and in spite of the fact, as the defendant contends, that he could know and see and appreciate, and could appreciate the danger from it, that he voluntarily assumed the risk of going over it at a rapid rate of speed in order to reach the train, and that he assumed whatever risk of injury that might be involved in taking the course that he did.

The plaintiff, on the other hand, contends that he could not see that there was ice there; that he might have known and did know, as he testifies, that the weather was very cold, and that there had been snow and ice and *and* sleet, but that he was going along the usual path leading from the pump house to the track; that there had been a light fall of snow that covered the ice so that he could not see it, and that there was nothing to put him on notice that there was any accumulation of ice along the path. That there is testimony that along the path which he traveled from the pump house up to about the little elevation when he began to go up towards the track that the ground was somewhat broken and not slippery; that where the ground had frozen and the snow and sleet had frozen, it made the walkway uneven, and that, therefore, it was not slippery; that

there was no reason—there is no reason why you should assume that he could have known that the conditions were different at the point where the path turned upon the railroad track, and upon which he says that he went and was going at the time he slipped and fell and injured himself, and that, therefore, you ought not to assume that there was any danger or risk that was open, obvious, to his inspection, and that you ought not to be satisfied that he assumed the risk of injury.

(Now, if by the exercise of ordinary care and prudence, which was the duty that he owed, he could have seen that the ice had accumulated at that place, and could have become aware that
99 there was risk in walking over it, then he would be charged with such facts as the exercise of such ordinary care would have disclosed to him, and if you are satisfied that they would have disclosed to him that the ice was there, and that it was slippery, then you would find that he had assumed the risk of injury in passing over it, and, in that event, you would answer the second issue "Yes," that he assumed the risk of injury. Unless you are so satisfied, you will answer it "No.")

To the foregoing charge in parentheses, defendant excepts.

Exception No. 30.

(If the evidence does not satisfy you that exercising ordinary care he would have become aware, or could have become aware of the conditions there, and the risk arising, then you would answer this second issue "No.")

To the foregoing charge in parentheses, defendant excepts.

Exception No. 31.

The only dangers of which he assumed the risk are those that are normally and necessarily incident to the occupation in which he was engaged. One moment. I do not know about that. Strike that out. Gentlemen, I will retract that. He assumes those that are normally and necessarily incident to the occupation in which he is engaged, and he assumes another sort, not naturally incident to the occupation, which arise out of the failure of the employer to exercise due care in respect to furnishing a safe place of work. If, in the exercise of ordinary care, he becomes aware, or can become aware of the defect or danger and of the risk arising from it, unless such defect or risk alike are so obvious—I have got that wrong again.

If the evidence satisfies you by its greater weight of the contention of the defendant upon this second issue, you will answer it
100 "Yes," the burden being upon the defendant. If the evidence does not so satisfy you, you will answer it "No." If you answer it "No." Now, if you answer the second issue "Yes," that is, that the plaintiff assumed the risk or danger, you need not go any further, because that would end the case, and the plaintiff would not be entitled to recover, but if you answer the second issue "No," that is, that he did not assume the risk, then you proceed to consider the third issue: "Did the plaintiff by his own negligence contribute to his injury?"

There the burden is again upon the defendant to satisfy you by

the greater weight of the evidence that the plaintiff contributed to his injury, and it must do this by the greater weight of the evidence, but it may call your attention, and you may consider all of the evidence both offered by the plaintiff and the defendant, to enable you to say whether or not the plaintiff did contribute to his injury by his own negligence.

Now, the defendant contends the plaintiff failed to exercise ordinary care for his own safety in going up the path, if he did go up the path, upon the track of the railroad; that he knew the weather conditions; he knew that there was a great deal of ice and snow all through the community; that he failed to exercise ordinary care for his own safety, and that was his duty, and it was his duty to act with the care of a man of ordinary prudence under all of the circumstances surrounding him, and that a man of ordinary prudence would not have done what the plaintiff did.

And the defendant contends that knowing the conditions that existed there, and knowing the danger of walking over frozen snow and ice, that the plaintiff hurriedly undertook to go up an ascent from the lower ground to the railroad track, and in doing so he was going so fast that he slipped and fell, or if you should find that he slipped and fell, it was because he did not exercise the care of a man of ordinary prudence.

101 The defendant contends that a man of ordinary prudence would not have gone anywhere along that track, either along the path or up the side of the embankment in weather like that, with the ground in the condition it was, with ice and snow generally distributed, having accumulated there for some 20 days or more, in the hurried way in which the plaintiff went. That a man of ordinary prudence would have taken more time about it, and that if he had done that, he would not have fallen, and that that was the proximate cause of his injury, his failure to exercise the care of a man of ordinary prudence in going up to the track and going upon it.

The plaintiff contends, on the other hand, that he went as a man of ordinary prudence would; that the pumper went before him with a lantern, and another one of the employees was walking behind him, and that they were all walking together, and that the train was waiting there and just beginning to start going to the next station where he expected to get the necessary supplies to repair the pump, and he was not running, but was walking somewhat hurriedly, rapidly; that the snow had covered all the ice so that he did not know that there was any ice there, or that it was more slippery than the path further down where he testifies the ground was broken up by the prints of tracks that had frozen over, and that the snow had frozen over the sleet that it was not slippery there, and he had no reason to believe it was slippery as he went up upon the track, upon the elevation leading from the ground to the track, and that he did what any man of ordinary prudence would have done under the circumstances.

Those are briefly the contentions of the parties upon this issue. You take all of the evidence bearing upon it, gentlemen, and if it satisfies you by its greater weight, the burden being upon the defend-

ant, that the plaintiff failed to exercise the care of a man of ordinary prudence in pursuing his way along this path, if he did get
102 upon the path to get upon the railroad track, and by reason of the failure to exercise such care, slipped and fell, and that was the real or proximate cause of his injury, then you would answer this third issue "Yes." Unless you are so satisfied you will answer it "No."

But if the evidence satisfies you that he exercised the care of a man of ordinary prudence under all the circumstances surrounding him, as you shall find them to be, then you would answer it "No," because that was the duty that he owed the defendant to exercise the care of a man of ordinary prudence in discharging the work and in going about the business of the defendant for which he was employed. If he did that, he could be guilty of no negligence. If he failed to do that, and was injured by reason of his failure, he was guilty of contributory negligence.

If you find by the greater weight of the evidence that a man of ordinary prudence would not hurry up a slope of the character of that at the point at which the plaintiff testifies he fell, under the weather conditions existing at Cochran at the time alleged, and when it was snowing, then the court instructs you that the plaintiff was guilty of contributory negligence, and you would answer the third issue "Yes."

Put in this charge on the second issue. The Court instructs you that the plaintiff is deemed to have notice of all risks which to a person of his experience and understanding are or ought in the exercise of ordinary care, to be open and obvious to him.

The Court instructs the jury that the plaintiff in his employment, fixing pumps for the defendant, and in going from place — in the performance of his duty, assumed the risk which inclement weather added to his employment, and if you find by the greater weight of the evidence that the plaintiff slipped on the ice or snow, which resulted solely from the inclement weather conditions, and that the same were not negligently left on the path over which he was traveling, if he was traveling over the path, you will answer the issue of assumption of risk, the second issue, "Yes."

103 If you find from the evidence by the preponderance thereof, that the plaintiff knew of the existence of ice at the place which he fell, or by the exercise of care, the care of a prudent man, could have knowledge of its existence at that point, he assumed the risk of injury from slipping thereon, and you will answer the issue of assumption of risk, which is issue No. 2, "Yes."

And put this under the charge on the first issue. The burden of proof is upon the plaintiff to satisfy you by the preponderance of the evidence that at the time he fell he was walking in the path provided by the defendant company for his use in going from the pump to the train, and if the plaintiff has failed to so satisfy you, you will answer the first issue "No." I am going back to the first issue, gentlemen. Now, coming right along after that. If you find that the path provided by the defendant for the plaintiff's use in going from the pump to the train did not pass in the rear of the tank

and come up to the track between the tank and the tool house, about 15 or 20 feet from the tank, you will answer the first issue "No."

Now, as to the third issue. If the evidence satisfies you by its greater weight that the plaintiff, by his own negligence, contributed to his injury, or of the contentions of the defendant under this issue, you will answer this third issue "Yes." If it does not so satisfy you, you will answer it "No."

Then you will proceed to the consideration of the fourth issue: "What damages, if any, is the plaintiff entitled to recover?"

If you reach that issue, gentlemen, I lay down the following rule for your government in the assessment of damages, and upon that issue the burden is upon the plaintiff to satisfy you by the greater weight of the evidence that he was injured and the extent of his injury, the burden is upon him to prove what amount he is entitled to recover. In answering this fourth issue, if you reach that issue.

104 The rule of law which shall govern you in answering the fourth issue is this:

(The plaintiff is entitled to recover as damages, if entitled to recover at all, one compensation for all injuries resulting from the defendant's negligent conduct. This damage embraces indemnity for loss of time, inability to perform labor or capacity to earn money, for injuries suffered by body or mind, which are the immediate and necessary consequence of the injury sustained. The plaintiff is to have a reasonable compensation for loss of bodily powers, actual suffering of mind or body, and also for any expense reasonably necessary which you find he may have incurred as a result of the injury sustained, which injury you find is the immediate necessary consequence of the defendant's negligent conduct, if it was negligent; to recover as damages one compensation for all loss which you find by the greater weight of the evidence the plaintiff has sustained in consequence of the defendant's negligent act.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 32.

Now, that is the rule for the ascertaining of damages laid down by the Supreme Court of North Carolina, but if the evidence satisfies you by its greater weight that the plaintiff, by his own negligence, contributed to his injury, then there must be a deduction of some amount from the amount that you would assess under the rule I have laid down as prescribed by the Supreme Court of North Carolina, because that is a provision of the United States Employers' Liability Act.

Under the common law, it was provided that even if the plaintiff was injured by the negligence of the defendant, he could not recover if he had contributed to his own injury, but under this act, this Employers' Liability Act, the existence of contributory negli-

105 gence on the part of the plaintiff does not prevent his recovery, but reduces the amount of it. The amount that you assess, therefore, under the rule laid down by the Supreme Court of North Carolina shall be diminished by the jury in proportion to the amount of negligence attributable to such employee under issue No. 3, if you

answer that issue "Yes." This means that the damages shall be diminished in proportion to the amount of the employee's, or the plaintiff's negligence, as compared with the combined negligence of himself and the defendant, and that where the casual negligence; that is, the negligence causing the injury, is partly attributable to the employee, in this case the plaintiff, and partly to the carrier, in this case the defendant, the employee shall not recover full damages, but only a proportional part bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both, the purpose being to abrogate the common law rule exonerating the carrier from liability in such cases and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee.

In order to pass upon this issue intelligently, gentlemen, you will consider all the evidence as to the extent of the plaintiff's injury.

He testifies that his hip was hurt when he fell, and that he suffered from that for some time, and that his shoulder was injured, and that since the injury he has been unable to use his right hand as he did before. That he is unable to raise the arm or hand above the shoulder or to lift it, or to do much work with it. That he suffered a great deal of pain. That he was greatly distressed in mind, and that he has been unable to pursue the ordinary work which he could do, on account of the conditions brought about by the injury to his shoulder. That this injury has made the shoulder stiff in the joint.
106 That there is an injury to the nerve or nerves of the shoulder, and that this has tended to bring about a stiffness and to prevent his having the use of it, and to cause him not only pain at the time and for a considerable time afterwards, but to cause the injury still to be painful. That at the time of the injury he was earning $90 a month. That he had been in the employment of the defendant for many years, and that he continued in their employment about 13 months. That since then he has been unable to obtain regular employment, and when obtaining some employment from this company or some other company, he lost his position because someone else was willing to do the work cheaper than he could do it, and since then he has obtained occasional work wherever he could get it.

He testifies that he has spent about $25 or $30 for drugs and liniments and various medicines for the treatment of it.

Now, as I have said to you gentlemen, under this rule laid down by the Supreme Court of North Carolina, you have a right to consider not only his lessened ability to earn money and to labor, if you find that that existed, but also his suffering of mind and body, if you find that there has been such suffering.

It is impossible for me to give you any definite rule which could afford you much help in determining what amount or how much you should assess for such suffering of mind or body, if you find that it existed.

(In the nature of things, it is impossible for the law to lay down any definite rule, but it says to the jury that they should award a reasonable compensation, with the emphasis on the word "reason-

able." He is to be compensated for all he has suffered, if you find that he has suffered, but it ought not to be exaggerated on account of any sympathy that you may have with him, but it ought to be reasonable, based upon the evidence, and you may use your common sense and your common observation of men, and what suffering that men undergo, and of any suffering that you may have had yourselves in order to enable you to determine what would be a
107 reasonable compensation for such pain and suffering as he sustained as the direct and immediate consequence of this injury, if you find that such pain and suffering were the direct and immediate results of the negligent conduct of the defendant.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 33.

The plaintiff contends that he has been seriously, painfully and permanently injured in his shoulder and hip and other parts of his person; that the bones, nerves, muscles and ligaments and other tissues and parts of his shoulder and arm were painfully, seriously and permanently injured, and that he has suffered great pain and loss of time and diminishment of ability to labor, and suffered loss of time and money and was put to expense on account of the injury.

The defendant, on the other hand, contends that even if you should be satisfied that the plaintiff suffered some injury, that it was not a serious injury and not a permanent injury. That physicians have given their testimony on both sides of the case with reference to the character of the injury of which he complained, and that most of them say that there was no injury to the bone of the shoulder. X-ray pictures were taken by three physicians, I think, and have been exhibited.

Dr. Horton testifies that he thought that he detected some slight separation of the collar bone; the other physicians testify that they discover no such separation or dislocation, and that the right shoulder was normal and the muscles well developed, and if there had been any continuous injury to the nerve, that the muscles would have shown indications of shrinkage, and that cases of that sort, where they are of serious character, usually result in a shrinking of the muscles, frequently in paralysis of the muscles, and that none of those symptoms appear, and that, therefore, you ought to con-
108 clude that the injury was not a serious one. That the plaintiff himself did not regard it as serious. That he never had any physician treat it. He testifies that he never employed any physician to treat it. That he did consult the railroad physicians and that they took an X-ray of it, and told him that there was some injury to the nerve, but that he undertook to treat it himself. That he bought liniments of various sorts and other medicines, and took them, and that he did not regard it as serious enough to employ a physician to advise and treat it, or to employ a physician to treat him, and, therefore, the defendant contends that if you reach this issue that you ought not to be satisfied that the plaintiff has suffered any serious injury, and that there has been evidence that the injury is permanent. That the testimony of the physicians is that it is not a permanent injury.

That Dr. Horton testifies, the plaintiff's witness, testified that it was not a permanent injury, and also the other physicians, and that there is no evidence that it is permanent in its character.

My recollection is that they were all asked about it, and said that the injury was one that could be cured by proper treatment.

Now, even if he has suffered by reason, because he failed to exercise reasonable care to procure treatment of this arm, you could not award any damages against the railroad company for any suffering that came by reason of his failure to secure treatment.

He ought to have acted like a man of reasonable prudence. That was his duty, if he had suffered an injury, to procure the attention of physicians and had the injury properly treated, and any suffering that may have come to him or any disability which you find has come to him by reason of his failure to exercise the care of a man of ordinary prudence in treating it and having himself looked after, after the injury occurred, that ought not, and is not and cannot be chargeable to the defendant on this issue of damages.

109 (I believe I will charge you, gentlemen, that there is no evidence of any permanent injury.)

To the foregoing charge in parentheses, defendant excepts.

Exception No. 34.

It was the plaintiff's duty to exercise the care of a man of ordinary prudence to secure medical treatment, and if you find that he has failed to do so, and that such medical treatment would have relieved the pain and remedied the condition of his arm, then you cannot consider the increased pain and suffering, and the loss of capacity to earn money brought about by the plaintiff's failure to exercise such care in fixing the amount of damages in this case.

Now, the plaintiff contends that he has suffered very greatly, that he had this arm examined and found that the nerve was affected, and that he used liniments for that purpose, and that was the treatement that he felt ought to be applied to it; that he did not discover that the bones were broken, but there seemed to be some injury to the muscles and tendons and the nerves, and that he contends that he pursued the course of a man of ordinary prudence under the circumstances. That is his contention about that; that he suffered very severely when the injury was inflicted, and for a long time afterwards, and that he continues to suffer from it. That he got over the injury to the hip in a very short time, or some two or three weeks, and I think Mr. Renn said that; but that he suffered from the injury in the shoulder which has continued to this time.

Now, you take all of that together, gentlemen, in determining what damages ought to be assessed, if you reach that issue.

As to the fifth issue, I charge you that if you find the facts to be as testified to by the witness, you will answer that "Yes."

110 (As to the sixth issue, I charge you that if you find the facts to be as testified to by the witnesses, you will answer that "No;" that is as to whether the plaintiff's cause of action accrued more than two years before this complaint was filed. If you find the facts to be as testified to by the witnesses, you will find the fifth issue "Yes" and the sixth issue "No.")

To the foregoing charge in parentheses, defendant excepts.
Exception No. 35.

And in considering this case, gentlemen, disregard the fact that the plaintiff is a private citizen and a resident of your county, and that the defendant is a non-resident corporation. If we undertook to decide cases on the ground of citizenship or on questions of whether or not litigants are private individuals or corporations, we lose the very spirit which will enable us to do justice. If you have got any dislike for corporations, disregard that, or if you have and special kindly feelings for corporations, do not let that influence you. Do not allow any sympathy that you may have for plaintiff influence you in determining any of these issues.

In weighing the testimony of the plaintiff, you are to remember that he is the plaintiff, and interested in your verdict, and you are to consider whether the interest he has in the verdict has any tendency to cause him to testify untruly, or to misrepresent any fact about which he testifies, and you are to take that in connection with the reasonableness of his evidence, the testimony as to his character, and his demeanor upon the stand, and all of the circumstances that have developed during the course of the trial, and give his testimony the weight that you believe it entitled to.

You are to take the testimony of the witnesses who were offered by the defendant, and who are now or who have been in the employment of the defendant, either as surgeons or were employed
111 in any department. Consider whether or not their connection with the company or their further connection may have any tendency to influence them or to cause them to testify untruly or to misrepresent any fact about which they have testified.

Take the evidence of their character, the reasonableness of what they say, and their demeanor upon the stand, and give to each and every one of them—the testimony of each and every one of them the weight that you believe it is entitled to.

All of this investigation, this evidence, all of the argument of counsel and the charge of the court are to enable you to reach the truth of this transaction, gentlemen. That is what courts, what laws are made to secure. What courts are instituted to aid in securing. Find out what the truth is, and when you have found that under each and every one of these issues, write down your answer here as the verdict.

The verdict means a true saying. It implies that the jury have found out what the truth is, and have written it down under the issues. Take the issues, gentlemen, and answer them.

One moment, gentlemen. I think I probably made it clear to you, but have some little doubt about it. I want to call you back and say the only allegation which you may consider, the only allegation of negligence which you can consider under the first issue is this: That the defendant had carelessly and negligently caused and permitted and allowed water to be poured or spilled around on the ground at said place and to become frozen, thereby covering the ground for a considerable space with a sheet of ice, and the defendant had negligently permitted and allowed the said ice to be and

remain upon the said ground at the said place and to be and become covered and hidden by snow, and thereby negligently caused a highly dangerous condition to exist, and the said place and
112 condition was highly dangerous and perilous, and the defendant had negligently failed to warn the plaintiff in any manner of the existence of the said danger.

In other words, I instruct you not to consider anything that the defendant failed to do with reference to any ice or accumulation of ice that came from any other source than the overflow of the tank.

I do not want you to hold the defendant—the defendant must not be held liable to anything that happened to the plaintiff by reason of any ice that had accumulated from natural conditions. Do you see what I mean, gentlemen? You may retire.

Issues.

NORTH CAROLINA,
Wake County:

Superior Court, June Term, 1915.

(Title of Cause.)

1. [illegible] the plaintiff injured by the negligence of the defendant?
Answer: "Yes."
2. Did the plaintiff assume the risk of injury?
Answer: "No."
3. Did the plaintiff, by his own negligence, contribute to his injury?
Answer: "No."
4. What damages, if any, is plaintiff entitled to recover?
Answer: "$3,500."
5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and was the plaintiff employed by the defendant in such commerce?
Answer: "Yes."
6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed?
Answer: "No."

113 Upon the coming in of the verdict, defendant moved for judgment non obstanti veredicto. Motion overruled. Defendant excepts.

Exception No. 36.

Defendant moves to set the verdict aside because the amount of damages awarded is excessive. Motion overruled. Defendant excepts.

Exception No. 37.

Defendant moves to set the verdict aside as against the weight of evidence. Motion overruled. Defendant excepts.

Exception No. 38.

Defendant moves for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence and in

the Court's charge to the jury, and in the Court's refusal to give defendant's requests for instruction, and in permitting plaintiff to amend his complaint so as to bring his cause of action within the provisions of the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and in refusing defendant's motions for judgment of nonsuit and to dismiss the action. Motion overruled. Defendant excepts.

Exception No. 39.

The Court thereupon entered and signed the following judgment:

114 *Judgment.*

NORTH CAROLINA,
Wake County:

In the Superior Court.

(Title of Cause.)

The above-entitled action coming on for a hearing, and being heard before his Honor, F. A. Daniels, Judge, and a jury, and the following issues having been submitted to the jury and answered by the jury as follows, to-wit:

1. Was the plaintiff injured by the negligence of the defendant?
Answer: "Yes."
2. Did the plaintiff assume the risk of injury?
Answer: "No."
3. Did the plaintiff, by his own negligence, contribute to his injury?
Answer: "No."
4. What damages, if any, is plaintiff entitled to recover?
Answer: "$3,500."
5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and was the plaintiff employed by the defendant in such commerce?
Answer: "Yes."
6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed?
Answer: "No."

Hereupon, it is by the Court considered, ordered, adjudged and decreed that the plaintiff, J. T. Renn, recover of the defendant, Seaboard Air Line Railway, the sum of three thousand five hundred
($3,500) dollars, with interest thereon from the 31st day
115 of May, 1915, until paid, together with the costs of this action, including the special allowance to physicians, to be taxed by the Clerk.

(Signed) F. A. DANIELS,
Judge Presiding.

(Signed) R. N. SIMMS,
(Signed) J. C. L. HARRIS,
Attorneys for Plaintiff.

To the judgment entered and signed by the Court, defendant excepts.

Exception No. 40.

Defendant, in open court, appeals to the Supreme Court. Notice of appeal given in open court, and further notice waived. Undertaking on appeal fixed in the sum of $50. By consent defendant is allowed until August 10, 1915, to file and serve statement of case on appeal, and plaintiff is allowed until September 20, 1915, to serve counter-statement or exceptions.

By subsequent agreement, defendant is allowed until September 1, 1915, to file and serve statement of case on appeal, and plaintiff is allowed until October 1, 1915, to serve counter-statement or exceptions.

Exceptions Grouped and Assignments of Error.

NORTH CAROLINA,
Wake County:

(Title of Cause.)

The defendant, Seaboard Air Line Railway, appellant, groups its exceptions and assigns error as follows:

1. For that the Court admitted the following testimony of plaintiff, J. T. Renn, over defendant's objection and exception:

116 "Q. Did you cause your own fall in any way?

A. No, I did not. I was just as careful walking as I could be.

This is defendant's exception No. 1.

2. For that the Court admitted the following testimony of plaintiff, J. T. Renn, over defendant's objection and exception:

"State whether if the tank had been operated in the usual way there would have been ice there at that time."

This is defendant's exception No. 2.

3. For that the Court admitted the following testimony of plaintiff, J. T. Renn, over defendant's objection and exception:

"Q. Do you know how the tank was operating; had you known it before.

A. Well, no. There had been some ice in front and between the tank and the main line by getting water, and the waste from the pipe, but there should not have been any ice along where I was."

This is defendant's exception No. 3.

4. For that the Court admitted the following testimony of plaintiff, J. T. Renn, over defendant's objection and exception:

"Had you ever seen, or did you ever see any ice at the place where you fell, before?

A. No."

This is defendant's exception No. 4.

5. For that the Court admitted the following testimony of plaintiff, J. T. Renn, over defendant's objection and exception:

"Q. Mr. Allen has asked you about seeing water around tanks.

Did you see any water at other times around back of tanks where this water was?

A. No."

This is defendant's exception No. 5.

6. For that the Court admitted the following testimony of plaintiff's witness, Frank Parks, over defendant's objection and exception:

"Q. Why was the tank running over?

"By the Court: Do you know?

117 "A. Yes. Because the pumper was neglecting his duty, and let it continue to run after the tank was full."

This is defendant's exception No. 6.

7. For that the Court refused, upon defendant's motion to strike out the answer to the foregoing question.

This is defendant's exception No. 7.

8. For that the Court admitted the following testimony of plaintiff's witness, Frank Parks, over defendant's objection and exception:

"Q. Was any ice usually around that tank at the place where Mr. Renn got hurt? A. No, not usually it was not."

This is defendant's exception No. 8.

9. For that the Court overruled defendant's motion for judgment of nonsuit upon the ground that the evidence offered by the plaintiff fails to establish negligence on the part of the defendant as alleged in the complaint. The defendant moves for judgment of nonsuit and to dismiss the plaintiff's action upon the further ground that the cause of action alleged in the complaint is based upon the common law and the statute law of the State of North Carolina, and the plaintiff's proof shows that he was employed by a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States at the time of his injury, and was at the time of his injury employed by such carrier in such commerce, and the cause of action proved arises under the Act of Congress of the United States of April 22, 1908, known as the Federal Employers' Liability Act; that there is no allegation in the complaint that the plaintiff was employed in interstate commerce and no allegation of facts constituting a cause of action under the Act of Congress; that the case proved was not pleaded and there is a total variance in pleading and proof. Motion overruled and defendant excepts.

This is defendant's exception No. 9.

118 10. For that the Court overruled defendant's objection to the allowance of the amendment to the complaint alleging that at the time plaintiff sustained the injury complained of he was employed in interstate commerce, upon the ground that it introduces a new cause of action, to-wit: a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the pro-

visions of Section 6 of the said Act of Congress providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from the plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the act of Congress of April 22, 1908.

This is defendant's exception No. 10.

11. For that the Court overruled defendant's objection to the allowance of the said amendment upon the ground that the Court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded.

This is defendant's exception No. 11.

12. For that the Court overruled defendant's objection to the said amendment to the complaint upon the ground that it contains averments of facts which are not contained in the original
119 complaint and which defendant should have an opportunity to prepare to defend and asks for a continuance if the amendment is allowed.

This is defendant's exception No. 12.

13. For that the Court overruled defendant's objection to the allowance of the following amendment to plaintiff's complaint upon the ground that it introduces a new cause of action, to-wit: a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States, while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section 6 of the said Act of Congress, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the Act of Congress of April 22, 1908:

"3*a*. That at the time the plaintiff suffered said injuries he was in the regular employment of the defendant as a pump repairer working as from time to time ordered by the defendant on the pumps used in connection with the line of defendant's railroad extending between the city of Raleigh, in the State of North Carolina, and the city of Richmond, in the State of Virginia; and at the time the plaintiff suffered said injuries he had been sent by the defendant from his home in Raleigh, North Carolina, to Cochran, Virginia, to

repair a pump of the defendant at said Cochran, Virginia, and he had visited and inspected said pump and discovered the need of a coupling or fitting or flange or union which was not obtain-
120 able at Cochran, Virginia, and which he thought (as afterward proved true) the defendant had at Skelton, Virginia; and the plaintiff at the time of suffering said injuries, was going along the usual path from said pump past a water tank of the defendant at Cochran, Virginia, to board at Cochran, Virginia, one of defendant's trains and to go to said Skelton, Va., to get said needed part or appliance to be used by him in repairing a pipe connected with said pump at Cochran, Va., which pump had heretofore been and was thereafter to be used by defendant in pumping water into said tank at Cochran, Va., from which tank water was from time to time taken by trains of the defendant, some of which trains were at such times being operated by defendant while engaged in interstate commerce, and that the train which the plaintiff was going to board and did board, was at said time engaged and operated by the defendant in interstate commerce; and that at said time the defendant was a railroad company engaged as a common carrier by railroad of freight and passengers in interstate commerce between the State of Virginia and the State of North Carolina."

This is defendant's exception No. 13.

14. For that the Court overruled defendant's objection to the allowance of said amendment upon the ground that the court has no power to allow it, because said amendment will change the cause of action under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. Objection overruled and defendant excepts.

This is defendant's exception No. 14.

15. For that the Court overruled defendant's objection to the allowance of said amendment upon the ground that it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend and asks for a continuance if the amendment is allowed.

121 This is the defendant's exception No. 15.

16. For that the Court sustained the plaintiff's objection and struck out the answer to the following question:

"Q. Mr. Barbee, you find a great deal of water around your tank, don't you?

A. "Yes."

This is defendant's exception No. 16.

17. For that the Court at the conclusion of all the evidence, overruled defendant's motion for nonsuit and to dismiss the action upon the ground that plaintiff failed to bring his action for injuries sustained while he was employed by the defendant in interstate commerce which arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, within two years from the date the cause of action accrued, as required by Section 6 of said Act.

This is defendant's exception No. 17.

18. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant.

"1. The Court charges you that if you believe the evidence in this case, the plaintiff was not injured by any negligence on the part of the defendant and you will answer the first issue 'No.'"

This is defendant's exception No. 18.

19. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

"2. The Court charges you that upon all the evidence in this case, the plaintiff assumed the risk of injury from falling on ice at the time and place testified to by the plaintiff, and you will answer the issue of assumption of risk 'Yes.'"

This is defendant's exception No. 19.

20. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

"3. If you do not answer the issue of assumption of risk 'Yes,' and do answer the issue of negligence 'Yes,' then the Court
122 instructs you that the plaintiff by his own negligence, contributed to his injury, and you will answer the issue of contributory negligence 'Yes.'"

This is defendant's exception No. 20.

21. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

"7½. The Court instructs you upon all the evidence in this case to answer the 6th issue 'Yes.'"

This is defendant's exception No. 21.

22. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, as requested by the defendant:

"8. A railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track, and if the plaintiff slipped on such snow or ice you will answer the first issue 'No.'"

This is defendant's exception No. 22.

23. For that the Court, over defendant's objection and exception, refused to instruct the jury as follows, except as appears in the general charge, as requested by the defendant:

"11. There is no evidence that the injuries sustained by the plaintiff are permanent, and you cannot consider permanent injury in assessing the damages in this case."

This is defendant's exception No. 23.

24. For that the Court, over defendant's objection and exception, instructed the jury as follows:

"The extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workman."

This is defendant's exception No. 24.

25. For that the Court, over defendant's objection and exception, instructed the jury as follows:

"If the evidence satisfies you by its greater weight that the
123 defendant failed in the performance of this duty, and by reason of such failure permitted ice to accumulate upon a path which was the usual path traveled by its employees to and from the pump house to the track, and by reason of such failure, and as a proximate cause thereof, the plaintiff slipped and fell and injured himself, then your answer to this first issue would be 'Yes,' unless you are so satisfied, your answer to it would be 'No.' "

This is defendant's exception No. 25.

26. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"Your next inquiry would be whether or not there was an accumulation of ice in that path, and upon that proposition the burden is still upon the plaintiff to satisfy you by the greater weight of the evidence of the truth of his contention. He says that there was an accumulation of ice there; that in pumping the water into the tank, the tank had been allowed to overflow, and that the ice was there three feet all around the tank and extending out some distance, and extending into this path; that it had remained there for some time. I believe one of the witnesses said that he saw it overflowing that day; that the weather was so cold that sometimes the water would freeze in falling; that the ice on the pond from which the water was pumped was some 12 or 15 inches thick, and the weather was bitter cold."

This is defendant's exception No. 26.

27. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"Now, the plaintiff contends that there was no reason why, in the exercise of ordinary care, the defendant might not have made that place safe for the movement of its employees; that it is in testimony that they cut the ice away in approaching the depot a short distance off, so that people having business with the agent, or passengers taking or leaving the train, could get away from the depot in the open place from which the ice had been cut. That the de-
124 fendant had present that day a section force which could have been utilized to open this path and cut the ice away. That it had employees there connected with the work train which had been there for some time during that evening, that could have been utilized for the purpose of opening this path and removing the ice, which the plaintiff alleges had accumulated there, and that it failed to exercise the care, reasonable care and prudence which I have told you it was its duty to exercise in order to make a safe place for its employees at that time along that path."

This is defendant's exception No. 27.

28. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"The plaintiff contends that this accumulation of ice was caused, not by the general weather conditions that prevailed, but in a large part, if not entirely, by the failure of the pumper to so regulate the pumping of the water as to keep it from running out of the tank, and that by failure to exercise proper care he had caused the tank

to overflow, and that the water had fallen down around it and had frozen, and that near the tank and around it on all sides of it the ice was about three feet deep, and extended out into this path."

This is defendant's exception No. 28.

29. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"If, as I said before, the evidence satisfies you by its greater weight, the burden being upon the plaintiff, of the truth of the plaintiff's contentions, as I have recited them, you will answer it (first issue) 'Yes.' "

This is defendant's exception No.29.

30. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"Now, if by the exercise of ordinary care and prudence, which was the duty that he owned, he could have seen that the ice had accumulated at that place, and could have become aware that
125 there was risk in walking over it, then he would be charged with such facts as the exercise of ordinary care would have disclosed to him, and if you are satisfied that they would have disclosed to him that the ice was there, and that it was slippery, then you would find that he had assumed the risk of injury in passing over it, and, in that event, you would answer the second issue 'Yes,' that he assumed the risk of injury. Unless you are so satisfied, you will answer it 'No.' "

This is defendant's exception No. 30.

31. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"If the evidence does not satisfy you that exercising ordinary care he would have become aware, or could have become aware of the conditions there, and the risk arising, then you would answer this second issue 'No.' "

This is the defendant's exception No. 31.

32. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"The plaintiff is entitled to recover as damages, if entitled to recover at all, one compensation for all injuries resulting from the defendant's negligent conduct. This damage embraces indemnity for loss of time, inability to perform labor or capacity to earn money, for injuries suffered by body or mind, which are the immediate and necessary consequence of the injury sustained. The plaintiff is to have a reasonable compensation for loss of bodily powers, actual suffering of mind or body, and also -or any expense reasonably necessary which you find he may have incurred as a result of the injury sustained, which injury you find is the immediate necessary consequence of the defendant's negligent conduct, if it was negligent, to recover as damages one compensation for all loss which you find, by the greater weight of the evidence the plaintiff has sustained in consequence of the defendant's negligent act.

This is the defendant's exception No. 32.

126 33. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"In the nature of things, it is impossible for the law to lay down any definite rule, but it says to the jury that they should award a reasonable compensation, with the emphasis on the word 'reasonable.' He is to be compensated for all that he has suffered, if you find that he has suffered, but it ought not to be exaggerated on account of any sympathy that you may have with him, but it ought to be reasonable, based upon the evidence, and you may use your common sense and your common observation of men, and what suffering that men undergo, and of any suffering that you may have had yourselves in order to enable you to determine what would be a reasonable compensation for such pain and suffering as he sustained as the direct and immediate consequence of this injury, if you find that such pain and suffering were the direct and immediate results of the negligent conduct of the defendant."

This is the defendant's exception No. 33.

34. For that the Court, over the objection and exception of the defendant, instructed the jury as follows:

"I believe I will charge you, gentlemen, that there is no evidence of any permanent injury."

This is defendant's exception No. 34.

35. For that the Court, over the objection and exception of the defendant, instructed the jury, as follows:

"As to the sixth issue, I charge you that if you find the facts to be as testified to by the witnesses, you will answer that 'No,' that is as to whether the plaintiff's cause of action accrued more than two years before this complaint was filed. If you find the facts to be as testified to by the witnesses, you will find the fifth issue 'Yes,' and the sixth issue 'No.' "

This is defendant's exception No. 35.

36. For that the Court overruled defendant's motion for judgment non obstante veredicto, upon the coming in of the verdict.

127 This is defendant's exception No. 36.

37. For that the Court overruled the defendant's motion to set the verdict aside because the amount of damages awarded is excessive.

This is defendant's exception No. 37.

38. For that the Court overruled the defendant's motion to set the verdict aside as against the weight of evidence.

This is defendant's exception No. 38.

39. For that the Court overruled defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, and in the court's charge to the jury, and in permitting plaintiff to amend his complaint so as to bring his cause of action within the provisions of the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and in refusing defendant's motions for judgment of nonsuit, and to dismiss the action.

This is defendant's exception No. 39.

40. For that the Court signed judgment as appears in the record.

This is defendant's exception No. 40.

MURRAY ALLEN,
Attorney for Defendant.

The foregoing is tendered by the defendant as its statement of case on appeal.

MURRAY ALLEN,
Attorney for Defendant.

Service of the foregoing statement of case on appeal is hereby accepted and copy received, this 23rd day of August, 1915. No rights waived.

R. N. SIMMS,
Of Counsel for Plaintiff.

128 Counsel for plaintiff and defendant having disagreed, the Court, after notice of time and place and counsel for plaintiff and defendant being present, settles the foregoing as the case on appeal for the Supreme Court.

(Signed) F. A. DANIELS,
Judge of Superior Court.

Burgaw, N. C., Sept. 30, 1915.

Clerk's Certificate.

NORTH CAROLINA,
Wake County:

I, Millard Mial, Clerk of the Superior Court of Wake County, North Carolina, do certify that the foregoing contains a full, true and correct transcript of the record in an action lately pending in said court between J. T. Renn, plaintiff, and Seaboard Air Line Railway, defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Raleigh, this 1st day of October, 1915.

[SEAL.] MILLARD MIAL,
Clerk Superior Court.

129 *Docket Entries.*

Appeal docketed—Oct. 1, 1915.

Argued—Oct. 13, 1915.

Opinion by Allen, J., affirming the judgment, and dissenting opinion of Brown, J., in which Walker, J., concurred, filed Nov. 17, 1915.

The opinion of the Court and the dissenting opinion are as follows:

130 Supreme Court of North Carolina, August Term, 1915.

No. 259.

J. T. RENN
v.
SEABOARD AIR LINE RAILWAY.

Wake.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant.

The original complaint is as follows:

1. That he is, and at the times hereinafter mentioned was, a resident of Wake County, North Carolina.

2. That the defendant is, and at the times hereinafter mentioned, was a corporation existing and doing business under the laws of the State of North Carolina, and was operating a line of railroad in the State of North Carolina and in the State of Virginia, and elsewhere.

3. That on the 14th day of January, 1912, the plaintiff was in the employment of the defendant and in the discharge of the duties of his said employment it became and was proper and necessary for the plaintiff to traverse a certain piece of ground beside the railroad track of the defendant and within its right of way at or near the station known as Cochran, Virginia, and to do so hurriedly in order to get abroad a train of cars then and there being operated by the defendant; that at the said time it was snowing and the ground had become and was covered and hidden by snow; that the defendant had carelessly and negligently caused, permitted and allowed water to be poured or spilled upon the ground at said place and to become frozen, thereby covering the ground for a considerable space with a sheet of ice, and the defendant had negligently permitted and allowed the said ice to be and remain upon the ground at the said place, and to become and be covered and hidden by the snow, and had thereby negligently caused a highly dangerous condition to exist and the said place and condition was highly dangerous and perilous and the defendant had negligently failed to warn the plaintiff in any manner of the existence of said danger; and on account of the negligence of the defendant in the particulars aforesaid,

131 the plaintiff, while proceeding along the said ground in the exercise of ordinary prudence and care, and without notice, knowledge or information or warning of any kind of the existence of said danger, was caused to slip and fall heavily upon the ground, and thereby his collar bone and other bones were injured and dislocated, and he was bruised and wrenched and strained and sprained, and he was caused to suffer other serious, painful, dangerous and permanent injuries to the muscles, bones, nerves and ligaments of his body, head and extremities, and caused to suffer much pain and anguish of body and mind.

4. That on account of the negligence of the defendant as aforesaid, the plaintiff has been damaged in the sum of ten thousand ($10,000) dollars.

Wherefore, the plaintiff prays judgment that he recover of the defendant the sum of ten thousand dollars damages, and the costs of this action, and that he have such other relief as may be proper.

The plaintiff offered evidence tending to prove: That he was a resident of the city of Raleigh, N. C., and in the employment of the defendant as repairer of its pumps between Raleigh, N. C., and Richmond, Va., and in the course of his employment was ordered by the defendant to go, as he did, from Raleigh, N. C., to Cochran, Va., to repair one of the pumps used by the defendant in connection with its line of railroad from Raleigh to Richmond; that he arrived at Cochran after dark; that the station building there is on the west side of the track; that across the track to the east there is a water tank which was used to supply water to engines of the defendant operating between Richmond and Raleigh; that the ground upon which the foundation of the tank is built is a couple of feet or more lower than the track; that southwardly from the tank is a tool house which is about — feet from the tank, and about — feet northwardly from the tank and located in a depression is the pump house; that water — pumped from the pool beside the pump up to the tank; that the railroad beside the pump house was on a fill some — feet high; that there was a path or way leading directly down
132 from the track to the pump house, but this was quite steep; that there was another path leading from the pump house southwardly, parallel with railroad track and up the incline and around behind the tank, then between it and the tool house and up to the railrad track and across to the station; that this was the usual path used by pedestrains in going back and forth between the station grounds and the pump, and the plaintiff was in this path when he fell; that upon his arrival that night the plaintiff left the train on the western side, went around the engine and down to the pump; that he then discovered that, to make the repair, he would need a four-inch flange union, and he recalled that the company had one at Skelton, Va.; that a work train of the defendant was standing on the track beside the station and about to leave (southbound) for Skelton, Va., and Norlina, N. C.; that the plaintiff, in company with the pumper, Lewis, and the section foreman, Parks, in charge of that section, left the pump house for the purpose of boarding the train and going for said flange union; that the pumper led the way, carrying in his hand a lighted lantern, the plaintiff following a few feet after him, and the section foreman, Parks, following a few steps behind the plaintiff; that they traversed the above mentioned usual path and were still in the same and within a few feet of the railroad track when the plaintiff fell; that the path up to that point had been rought; that the weather had been cold for some time and there had been snow on the ground, which had partly melted during the days and froze again during the nights after being tracked, and hence was roughened; that during the day of the night on which plaintiff's injury occurred the

defendant's pumper had unnecessarily allowed the pump to run long after the tank was filled with water and caused the tank to overflow for several hours, and this water which had overflowed had spread and frozen upon the ground and pathway at the place where the plaintiff fell, leaving a smooth, slick, surface, dangerous for the use of pedestrains; that snow had been falling for an hour or two before plaintiff's fall, and this had covered the smooth
133 ice, and the plaintiff could not see it, and knew nothing of the presence of the ice; that he did not know it was there and could not discover it by the use of his sight, and that he had never seen ice there before; that the defendant had never permitted the formation and accumulation of ice there before; that he was walking in a careful manner, watching his footsteps by the aid of the lantern in front of him; that neither the pumper nor the section foreman, Parks, had in any way warned him of the condition of said pathway, and that Parks knew it existed, as he had been present at the station all during the day and had seen the water overflowing for a long time and freezing, as aforesaid; that Parks had there present all during the day a section force of eight men and only three of them had been occupied during the day, and the work train had been at that station for several hours with its crew of hands, and none of them had removed the ice or roughened it, or placed any substance upon it to make the footing safe, and the ice covered at that point the usual path for approaching the train from that side of the station; that the plaintiff slipped on the ice and fell and was seriously injured.

The plaintiff introduced a witness by the name of Parks who was present at the time the plaintiff was injured and testified as to the condition of the ground, of the weather and to other circumstances including that of the tank running over. He was asked the question, "Why was the tank running over?" and he replied "Because the pumper was neglecting his duty and let it continue to run after the tank was full," and the defendant excepted.

At the conclusion of the evidence the defendant moved for judgment of nonsuit upon the following grounds:

1. That the evidence disclosed a right of action under the Federal Employers' Liability Act and that the complaint did not state a cause of action under this statute.

2. That there was no evidence of negligence.

The plaintiff contended that the complaint was sufficient
134 and stated a cause of action under the Federal act, but asked leave to amend by alleging that the plaintiff was employed in interstate commerce at the time of his injury.

The defendant objected to the amendment as it appeared that it was asked for more than two years after the injury occurred.

The amendment was allowed and the defendant excepted.

His Honor then overruled the motion for judgment of nonsuit and the defendant excepted.

The defendant then filed an answer pleading the statute of limitations and assumption of risk as defenses.

The defendant requested His Honor, in apt time and in writing,

to charge the jury, if they believed the evidence to answer the issue as to the assumption of risk in the affirmative.

This was refused and the defendant excepted.

His Honor charged the jury among other things, as follows: That the employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work to be done by the employee. (The extent of its duty to its employee is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workman.)

To the foregoing charge in parentheses, defendant excepted.

His Honor also instructed the jury to answer the issue as to the statute of limitations in the negative, and the defendant excepted.

The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant?

Answer: Yes.

2. Did the plaintiff assume the risk of injury?

Answer: No.

3. Did the plaintiff, by his own negligence, contribute to his injury?

Answer: No.

4. What damage, if any, is plaintiff entitled to recover?

135 Answer: $3,500.00.

5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and was the plaintiff employed by the defendant in such commerce?

Answer: Yes.

6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed?

Answer: No.

Judgment was entered upon the verdict in favor of the plaintiff and the defendant appealed.

R. N. Simms, J. C. L. Harris, and Douglass & Douglass, Attorneys for Plaintiff.

Murray Allen, Attorney for Defendant.

ALLEN, *J.*:

It is admitted that the defendant is a common carrier engaged in interstate commerce and that the plaintiff was employed in such commerce at the time of his injury.

It was therefore necessary and essential to allege a cause of action under the Employers' Liability Act because the Federal statute is exclusive and supercedes the right of action under the State law. Mondou v. R. R., 223 U. S., 1; R. R. v. Wulf, 226 U. S., 570; and Wabash R. R. Co. v. Hayes, 234 U. S., 86.

In the last case the court says, "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling, and a recovery could not have been had under the Common or Statute law of the State, in other words, the Federal act would have been exclusive in its operation not merely

cumulative." Citing for this position among others, the Mondou case, which says, of the Employers' Liability Act, "And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superceded."

We must then examine the original complaint for the purpose of seeing if it alleges a cause of action under the Federal Act,
136 and if not, must inquire into the power of the court to allow the amendment.

This presents a question of pleading and practice under the laws of this State as the Supreme Court of the United States has said in Brinkmeier v. R. R., 224 U. S., 268, in reference to an assignment of error on account of an amendment to a pleading "Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the State it is not subject to review by us," and there are many other cases to the same effect.

When we turn to our statutes we find it is provided by Section 515 of the Revisal that "No variance between a pleading and proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits," and by Sec. 495, that "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

These statutes were considered in Blackmore v. Winders, 144 N. C. 215, and it was there held with reference to a pleading that "If it can be seen from its general scope that a party has a cause of action or defense though imperfectly alleged, the fact that it has not been stated with technical accuracy or precision will not be so taken against him as to deprive him of it, if in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective, or redundant may be its statements, for, contrary to the common law rule, every reasonable intendment and presumption must be made in favor of the pleader," and this was approved in Brewer v. Wynne, 154 N. C., 467.

If this rule of construction is applied to the original complaint and it is construed in the liberal spirit contemplated by the Code, it alleges a cause of action under the Federal statute.

It must be kept in mind that the plaintiff was employed in
137 interstate commerce at the time of his injury by an interstate carrier, and that he had no cause of action except under the Federal statute because, as we have seen, it had the effect of superceding the state laws.

The original complaint alleges that the plaintiff was injured by the negligence of the defendant and that this caused his damage, which he prays the court to award him. He could not be entitled to recover damages except under the Federal statute. He alleges further that the defendant was operating a line of railway in the State of North Carolina and Virginia, and this made it an interstate carrier. There is no reference in the complaint to the fact that the defendant did an intrastate business. The plaintiff alleges further

that he was in the employment of the defendant, presumably in the interstate business which the defendant was conducting. He says further that he was in the discharge of the duties of his said employment at the time of his injury and that he lived in Wake County, N. C., and was injured in Cochran, Va.

As there is no reference to intrastate business in the complaint, and it is alleged that the defendant was doing an interstate business, that he was injured while in the discharge of his employment, is not the inference permissible and reasonable that he was employed in interstate business and was injured in the discharge of his duties in that employment.

If, however, the original complaint does not allege a cause of action under the Federal act, we are of opinion that the court had the power to permit it to be amended by alleging that the defendant was employed in interstate commerce at the time of his injury.

We must again have recourse to our own statutes and decisions, and we find that "Any pleading may be once amended of course, without cost and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it be made to appear to the court
that it was done for the purpose of delay, and the plaintiff or
138 defendant will thereby lose the benefit of the term for which
the cause may be or is docketed for trial" (Rev. Sec. 505), and that "The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or *by inserting other allegations material to the case.*" Rev. Sec. 507. (Italics ours.)

These Sections of the Revisal have been very fully considered in Ladd v. Ladd, 121 N. C., 118; Lassiter v. R. R., 136 N. C., 93; Bank v. Duffy, 156 N. C., 87, and in other cases, and the distinction is drawn between a *defective statement of a cause of action which may be amended* and the statement of a defective cause of action which cannot be amended.

In the Lassiter case, the court says, "The difference between a defective statement of a good cause of action which can be amended by inserting other material allegations and a statement of a defective cause of action, is that the latter cannot be made a good cause by adding other allegations."

If this is a correct statement of the law, it is conclusive upon the power of the court to amend the complaint by allowing an additional allegation to be made, as the original complaint with the amendment admittedly states a good cause of action under the federal statute.

The case of Railroad v. Wulf, 226 U. S., 570, seems to be decisive of the right to amend. In that case Sallie C. Wulf commenced an action in the Circuit Court of the United States in the Eastern District of Texas, in her individual capacity to recover damages for the death of her son who was killed in Kansas, and she alleged in her original complaint that in the State of Kansas a right of action was

provided by statute for injuries resulting in death. The defendant was engaged in interstate commerce and the intestate was killed while employed in that commerce. The plaintiff could not sue in her individual capacity under the Federal act. More than
139 two years after the injury, the Circuit Court permitted an amendment by which she was allowed to prosecute the action as administratrix of her son. The Supreme Court of the United States approved the amendment and held that it was not equivalent to the commencement of a new action so as to render it subject to the two years' limitation prescribed by Section 6 of the Employers' Liability Act, and that the amendment related back to the beginning of the action.

The case of R. R. v. Wyler, 155 U. S., which is relied on by the defendant, is commented upon in the Wulf case and distinguished and it was pointed out that in the Wyler case the amendment introduced a new and distinct cause of action while in the case before us there is but one cause of action, and if the original complaint was defective it is only because of the absence of one allegation necessary to a complete and perfect statement of a cause of action.

The Employers' Liability Act confers concurrent jurisdiction upon the State courts for the trial of causes of action arising thereunder and instead of prescribing the practice and procedure for the State Courts it is provided in another act of Congress as to actions at law in the Federal Courts (and this falls within that class), that "The propriety of amendments to pleadings in the Circuit and District Courts of the United States is governed by the provisions of Section 1914 of the Revised Statutes to the effect that: The practice, pleadings and form and mode of proceeding in Civil causes other than Equity and Admiralty causes in the Circuit and District Courts shall conform as near as may be to the practice, pleadings and form and mode of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held. Any rule of court to the contrary notwithstanding. 1 Ency. U. S., 298."

If therefore, the action had been commenced in a Court of the United States the power would have existed of "inserting other allegations material to the case" in conformity with our statute (Rev. Sec. 507), and this power cannot be less when the action is
140 brought in the courts of the State.

If a proposed amendment cannot be allowed because material and necessary to the statement of a cause of action the power of amendment, which Mr. Justice Swayne says, in Tilton v. Cofield, 93 U. S., —, "is incidental to the exercise of all judicial power and is indispensable to the ends of justice" because useless and of no effect as an amendment need not be made if not material.

We therefore conclude that the court had the power to allow the amendment, and this also disposes of the exception to the charge upon the 6th issue because the amendment related back to the commencement of the action which was brought within two years from the time of the injury.

The defendant also relies, in his motion for nonsuit, upon the

contention that there is no evidence of negligence and this necessitates an examination of the duty imposed upon the employer and whether the evidence discloses a failure to perform that duty which proximately caused the injury to the plaintiff.

In R. R. v. Horton, 233 U. S., 492, the court says: "The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence is exercised, to the end that the place in which the work is to be performed and the tools and appliances for the work may be safe for the workmen; and concludes that the Employers' Liability Act has not changed this rule of liability.

It being then, the duty of the defendant to furnish the plaintiff a reasonably safe place in which to do his work, and the authorities are all to this effect, is there any evidence that it failed in the performance of this duty?

The plaintiff was injured at night and he testifies that he was exercising due care for his own safety. He had not been about the premises where he was injured on the day of the injury until he was injured.

141 There is evidence that an employee of the defendant whose duty it was to pump water into the tank unnecessarily permitted the pump to continue working after the tank was full, and that this caused water to pour out upon the path over which the plaintiff was required to go in the performance of his duties; that this continued for such a length of time that a solid sheet of ice formed across the path; that the ice was smooth, slippery and dangerous, that the weather was very cold and that it might be reasonably anticipated that ice would form where the water fell; that this continued during the day before the plaintiff was injured and that the ice could have been easily removed; that a sufficient work force was present and available to remove the ice and that it did not do so; that this work force had removed ice from the pathway nearer to the station than the place where the plaintiff was injured; that the ice was covered with snow which concealed its presence from the plaintiff.

This furnished some evidence that the defendant had failed in the performance of its duty to provide a reasonably safe place for the plaintiff to work and the evidence further shows that the plaintiff was injured by the failure to perform this duty.

We therefore conclude that the judgment of nonsuit was properly overruled.

The charge of His Honor as to the duty of the defendant to provide a safe place is substantially taken from the Horton case which we have before cited, and the same case sustains the ruling refusing to direct a verdict in favor of the defendant on the issue of assumption of risk. In that case the Court says, "Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation may arise out of the failure of the employer to exer-

cise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the em-
142 ployee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances would have observed and appreciated them."

His Honor followed this statement of the law quoting this language from the opinion and saying further, "If, by the exercise of ordinary care and prudence, it was the duty that he owed, he could have seen that the ice had accumulated at that place, and could have become aware that there was risk in walking over it, then he would be charged with such facts as the exercise of such ordinary care would have disclosed to him, and if you are satisfied that they would have disclosed to him that the ice was there and that it was slippery, then you will find that he assumed the risk of the injury in passing over it and in that event you would answer the second issue 'Yes.'" And again, "That the plaintiff in his employment, fixing pumps for the defendant, and in going from place to place in the performance of his duty, assumed the risk which inclement weather added to his employment, and if you find by the greater weight of the evidence that the plaintiff slipped on the ice or snow, which resulted solely from the inclement weather conditions, and that the same were not negligently left on the path over which he was travelling, if he was travelling over the path, you will answer the issue of assumption of risk, the second issue, 'Yes," and again, "If you find from the evidence by the preponderance thereof, that the plaintiff knew of the existence of the ice at the place where he fell, or by the exercise of care, the care of a prudent man, could have knowledge of its existence at that point, he assumed the risk of injury from slipping thereon, and you will answer the issue of assumption of risk, which is issue No. two, 'yes.'"

This complies with the rule laid down in the Horton case, because if the evidence of the plaintiff is true, the condition of the place where the plaintiff was injured was not normal but was unusual, and the plaintiff could not discover it by the exercise of ordinary care.

143 The witness, Parks was asked: "Why was the tank running over?" Objection by the defendant. Objection overruled; defendant excepted. He replied: Because the pumper was neglecting his duty and let it continue to run after the tank was full."

We do not approve of the expression "because the pumper was neglecting his duty" and doubtless if defendant had moved to strike this out as an expression of opinion the motion would have been granted, but the motion to strike out was made upon another ground and one which is not tenable—that this particular act of negligence was not alleged in the complaint and it is well settled that "Where a party states the ground of his objection to evidence below he cannot rely upon a different ground in this court." Ludwick v. Penny, 158 N. C., 113.

In Presnell v. Garrison, 122 N. C., 525, Furches, J., says: "But as

a wrong reason was assigned for the objection, we treat the case as if no objection had been taken," and Rollins v. Henry, 78 N. C., 342; Kidder v. McIlhenny, 81 N. C., 123, and Janes v. Call, 93 N. C., 179, support the same rule.

It is not necessary to allege the negligent act of permitting the tank to run over, in the complaint, because the negligence relied on is that the defendant did not provide a safe place for the plaintiff to work, and evidence that the tank ran over was competent under this allegation for the purpose of showing that the ice did not form across the path from natural causes.

If, however, His Honor had been asked to strike out the answer of the witness upon the ground that it was an expression of opinion, his refusal to do so would not have constituted reversible error, because when the answer is considered as a whole and in connection with the context it amounts to no more than a statement that the pumper permitted the pump to continue to run, and the tank ran over, which is a fact and not an opinion.

The plaintiff while on the witness stand was asked: "Did you cause your own fall in any way?"

Objection by the defendant. Objection overruled, defendant excepted, and he replied: "No, I did not. I was just as careful walking as I could be."

144 The case of Phifer v. R. R., 122 N. C., 940, is authority for the position that the latter part of the answer is objectionable as an expression of an opinion, but the later cases and the trend of authority elsewhere are that it is competent as a statement of a fact. Taylor v. Security Co., 143 N. C., 383; Britt v. R. R., 148 N. C., 40; State v. Leak, 156 N. C., 647; 3 Wig. Ev., Sec. 1938, McKelvey Ev. p. 220.

Prof. Wigmore says, Vol. 3, Sec. 1949, "This topic is one of the few upon which there has ever existed in the English precedents any foundation for doubt. The subject of the testimony in question is manifold; sometimes it is whether proper care was taken, sometimes whether action was reasonable, sometimes whether sufficient skill was shown, sometimes whether a place or a machine was safe; but all the forms seem reducible to a general one, namely, whether a certain standard of conduct was observed. Looking first at the orthodox practice in England, it is clear there is not and never has been any real question as to the propriety of such testimony. The morbid and doctrinaire theory of cautiousness which is the foundation of the American rulings has never been known at the English bar."

He speaks of the rule of exclusion as a "modern excrescence on the common law" and concludes that such evidence is competent.

Mr. McKelvey in a passage quoted with approval in State v. Leak, says: "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence. A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense,

and within the meaning of the phrase 'matter of fact' as used in the Law of Evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence
145 presented to his eyes, to the color of a person's hair, or any other physical fact of like nature. This class of evidence is treated in many of the cases as opinion admitted under exception to the general rule, and in others as matter of fact—'short hand statement of fact'—as it is called. It seems more accurate to treat it as a fact, as it embraces those impressions which are practically instantaneous, and require no conscious act of judgment in their formation. The evidence is almost universally admitted, and very properly, as it is helpful to the jury in aiding to a clearer comprehension of the facts."

In State v. Williams, 168 N. C., 195, expressions in dying declarations "I did nothing," "He cut me for nothing," "They had no occasion to shoot me," "I have done nothing to be shot for," are considered as statements of facts and not opinions

If however, the evidence was objectionable it could have had but little, if any, bearing upon the issue because the plaintiff described his conduct in detail and showed he was careful and there was no evidence to the contrary.

We might also dispose of the exception upon the ground that it was competent for the witness to say he did not cause his own fall, and if the answer went beyond the question the remedy of the defendant was to move to strike out. Cator v. Taylor, 160 N. C., 106.

The judges of the Superior Court should be careful in the application of this principle to see that opinions are not admitted under the guise of facts, and usually it is better and wiser to require the witness to state the circumstances surrounding the transaction and no more.

We have carefully considered the whole record and find no error.

No error.

146 No. 259.

J. T. RENN
vs.
SEABOARD AIR LINE RAILWAY.

BROWN, *J.*, Dissenting:

1. The original complaint in this case does not state a cause of action under the Federal Employers' Liability Act. The argument that it does state such a cause of action is the same argument advanced in the first employers' liability case, Howard v. Illinois Cent. Ry. Co., 207 U. S. 463, and was rejected by the United States Supreme Court. It was held that the Federal Employers' Liability Act of 1906 was unconstitutional because it embraced all of the em-

ployees of a carrier engaged in interstate commerce, whether the employees were employed in such commerce at the time of their injury or not. Congress then passed the Act of 1908 and limited it to employees who are killed or who are injured while employed in interstate commerce. The most essential part of a cause of action under the statute is the character of the employment in which plaintiff was engaged at the time of his injury. It makes no difference that the employer is a carrier engaged in interstate commerce, unless the injured employee was employed in such commerce at the time of his injury. In Brinkmeier v. R. R., 224 U. S., 268, the terms of the act in question were such that its application depended, first, upon the carrier being engaged in interstate commerce by railroad, and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such carrier, but only such as were used in interstate commerce. Mr. Justice Van Devanter writing the opinion of the Supreme Court of the United States, says:

"This was an action to recover for personal injuries sustained by a brakeman while coupling two freight cars on a side track of the defendant railway company at Hutchinson, Kansas. The defendant prevailed in the state courts (81 Man. 101, 105 Pac. 221) and the plaintiff brings the case here. The injury occurred November 12, 1900, and the action was begun March 15, 1901.

147 The question first presented for decision is whether the petition stated a cause of action under the original safety appliance act of March 2, 1893, 25 Stat. at L. 531, chap. 196 U. S., Comp. Stat. 1901, p. 3174, which made it unlawful for any common carrier engaged in interstate commerce by railroad 'to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact,' etc. The petition, if literally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad; that the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. The Supreme Court of the state held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right."

It would seem unnecessary to refer to other authorities in support of the propositions, first, that the construction of this complaint for the purpose of determining whether it states a cause of action under the Employers' Liability Act is a federal question, and not subject to control by state statutes and the decisions of state courts; and, second, that the complaint does not state a cause of action under the federal act. Reliance by the court upon the language quoted from the Brinkmeier case to support the conclusion that this is not a federal question results from a misunderstanding of the language used and its effect. Plaintiff brought suit in 1901, alleging a cause of action under the state law. In 1908, he proposed to amend so as to bring the action under the federal safety appliance act. The Kansas court held that this amendment could not be

made, the period of limitation having expired in the meantime. The Supreme Court of the United States said that this ruling involved only a question of pleading or practice under the laws of the state. If the Federal safety appliance act is examined,
148 the reason for this statement will become apparent. That act contains no limitation whatever as to time within which an action based upon its provisions must be brought. The period of limitation referred to by the Kansas Court and by the Supreme Court was the limitation fixed by the law of Kansas, and neither the plaintiff nor defendant could have been deprived of a right arising under a federal statute by the ruling of the Kansas court permitting the amendment. In the case before us the federal act limits the time. There can be no doubt that the United States Supreme Court will review the ruling of a state court which deprives a defendant of the benefit of this provision of the act.

In Thornton's Federal Employers' Liability Act, (2nd Edition) sec. 140, it is said: "The true rule is that if the declaration or complaint does not disclose the action is based or grounded upon the statute, then the plaintiff is not seeking to recover for an injury received while engaged in interstate traffic of the defendant and the sufficiency of his pleading must be measured by the general state law, the provisions of the statute not being involved. However, if the evidence discloses the case is one under the statute, there will be a fatal variance and the plaintiff must fail."

The conclusions in the opinion that the complaint sufficiently alleges that the plaintiff was employed in interstate commerce are drawn from these facts: An employee of an interstate carrier who lives in Wake County, North Carolina, is injured while at work in Cochran, Va. If this conclusion is justified the test for the application of the statute would be, not the character of the employment, but the place of residence of the employee. If the inference is permissible as is suggested that plaintiff was employed in interstate commerce when injured, he would have required proof of no other facts than those alleged in order to recover under the Federal Act. Can it be possible that any court would hold that proof of the facts alleged, and no more, would show a case triable under the Federal act to the exclusion of the state law?

2. The court had no power to allow the amendment be-
149 cause it sets up a new cause of action, which is barred by the two year period of limitation fixed by the Federal act.

This is a federal question, involving the enforcement of one of the most important features of the Federal Employers' Liability Act, and in looking to our statutes and decisions as the means of depriving the defendant of the benefit of the limitation period provided by section 6 of that act, I think the court is going astray. But if we look to our statutes and decisions, there is every authority for holding that the allowance of this amendment was erroneous.

It will be found that section 507 of the Revisal does not end with the language quoted in the opinion, but contains this further provision, which is the part particularly applicable to this case: "or when the amendment does not change substantially the claim or *or*

defense, by conforming the pleading or proceeding to the fact proved." The plaintiff was permitted to amend his complaint to conform to the facts proved, and the statute by strongest implication prohibits this when, as here, the amendment changed substantially the claim and the defense.

It is true that we have held that a defective statement of a good cause of action may be amended, but such decisions cannot be applied in this case. This is not a defective statement of a good cause of action. It is a perfect statement of a cause of action good at common law and under the state statute. The fact that plaintiff did not have the cause of action which he pleads does not make his plea defective. The court fails to note the distinction between the cause of action which arose in favor of plaintiff and the cause of action which he sets forth in his complaint. Defective statement of a good cause of action may be taken advantage of by demurrer. Would this court seriously consider a demurrer to the original complaint in this action? It is lacking in none of the essentials of a good cause of action, and a demurrer would have been overruled without argument. It is true, as the court says, that the original complaint with the amendment states a good cause of action under the Federal statute, and that is the very basis of the defend-
150 ant's objection that it does so after the right of action under the statute has expired. But it does not follow that the original complaint contained a defective statement of the same cause of action rather than a good statement of a different cause of action.

It has been the long established rule in this state that where by an amendment a new charge is introduced against the defendant, he may make such defenses to it as if it were the foundation of an action then newly begun. Christmas v. Mitchell, 38 N. C., 464; Cogdell v. Exum, 69 N. C., 464; Patterson v. Wadsworth, 94 N. C., 558; Gillam v. Insurance Co., 121 N. C., 369. "Amendments are not admissible where the effect would be to prejudice acquired interests, or take away any defense which could be made to an action begun at the time of the amendment." Henderson v. Graham, 84 N. C., 496. "Where the cause of action is changed by an amended complaint, the defendant has the right to set up in the answer thereto any legal defense including the statute of limitation, just as if the action had been commenced at the date of the amended complaint." Sams v. Price, 121 N. C., 392.

In Bennett v. R. R., 159 N. C., 345, we said: "While courts are liberal in permitting amendments, such as are germane to a cause of action, it has been frequently held that the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment.

Best v. Kinston, 106 N. C., 205;
Merrill v. Merrill, 92 N. C., 657;
Clendennin v. Turner, 96 N. C., 416.

In the last case it is said; 'The court has no power, except by consent, to allow amendments, either in respect to parties or the cause of action, which will make substantially a new action, as this would

be not to allow an amendment, but to substitute a new action for the one pending.'" Hall v. R. R., 146 N. C., 345.

The Federal Employers' Liability Act gives a cause of action separate and distinct from the common law cause of action and the cause of action created by our Revisal, sec. 2646. Sal. Ry. v. Horton, 233 U. S., 492. A cause of action not previously existing was created by the Federal Act. In Taylor v. Taylor, 232 U. S., 363, the Supreme Court says: "The Federal Employers' Liability Act is more than a statutory declaration of the remedy to be pursued, it is the 'source of his (the employee's) right.'" In Illinois Central R. Co. v. Behrens, 233 U. S., 473, Mr. Justice Van Devanter says: "There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." See also Pedersen v. R. R., 229 U. S. 150;

St. L. I. M. & S. R. Co. v. Craft, 237 U. S., 648;
Mondou v. N. Y. N. H. & H. R. Co., 233 U. S., 1;
Michigan Central R. Co. v. Vreeland, 227 U. S., 59.

If, as is held by the Supreme Court of the United States the effect of this statute was not to create a new remedy for an existing cause of action, but to create a new cause of action, then it follows necessarily that it is not the same cause of action as that existing at common law and under the statute of this state, and in introducing this cause of action by way of amendment, the plaintiff cannot avoid the requirement that suit to enforce such cause of action must be brought within two years after the cause of action accrued. Our decisions, which I have cited, seem to conclusively support the defendant's position in this case. But, as I have said, this is not a state, but a federal question, and must be controlled by the decisions of the United States Courts. The case of Union Pac. R. Co. v. Wyler, 158 U. S., 293, seems to me to be directly in point against the plaintiff's right to amend his complaint. In that case the original complaint set forth a cause of action under the general law of master and servant. The amendment declared under a state statute regulating such action. It was held that this amendment could not be permitted because it constituted a departure in pleading and set up a new cause of action. The principles laid down in this case have been accepted everywhere, and the United States Supreme Court has had frequent occasion to re-examine the case, and its correctness has never been questioned.

Atlantic & Pac. R. Co. v. Laird; 164 U. S., 396;
United States v. Dalcour, 203 U. S., 408, 423;
Missouri K. & T. R. Co. v. Wulf, 226 U. S., 570;
St. L. I. M. & S. R. Co. v. Hesterly, 228 U. S., 703.

An examination of the Wulf case, 227 U. S. 570, will show that it is not decisive of the right to amend in this case. From the institution of the Wulf case, it was *intended*, and appears in the original complaint, that the plaintiff's intestate was employed in interstate

commerce at the time of his death. The allegation is that the deceased at the time of his death was "in the employ of the defendant as a locomotive fireman and in the performance of his duties as such upon a train bound from Parsons, in the State of Kansas, to Osage, in the State of Oklahoma." The amendment permitted merely changed the character in which plaintiff sued from her individual capacity to administratrix. The Supreme Court of the United States held that this was a change in form and not in substance and did not change the cause of action as originally alleged. The court said in the opinion that in the original and amended petitions "It was sufficiently averred that deceased came to his death through injuries suffered while he was employed by the defendant in interstate commerce. In Pactillo v. Commission Co., 131 Fed. 680, cited in the Wulf case, the rule of the federal courts in respect to amendments is stated as follows:

"An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the state, a plaintiff
153 is only required to state the facts which constitute his cause of action."

It is clear that the Wulf case and the Wyler case are not in conflict. In St. L. I. M. & S. R. Co. v. Hesterly, 278 U. S. 703, it is said:

"The plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts. Whether the defendant could have defeated the first count also on the ground that the plaintiff was suing upon a statute of one jurisdiction, whereas the action could be maintained only on that of another, need not be decided, since the defendant asks reversal of only so much of the judgment as rests on the second count. Hence it is unnecessary to consider whether the principle of Union P. R. Co. v. Wyler, 158 U. S., 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; or that of Missouri K. & T. R. Co. v. Wulf, 226 U. S., 570, 577, 57 L. ed. — , 33 Sup. Ct. Rep. 135, should be applied." In the case of Morrison v. B. & O. R. Co., 40 App. Cas. D. C., 391, which is in point, it is said: "The original complaint herein invoked the rule of the common law as a ground of action. The attempt of the plaintiff more than one year after the alleged bad faith of the defendant to invoke a different rule, namely, the rule prescribed by the act of 1906, must be held to amount to the commencement of a new action. The change was

one of substance and not merely of form. Union P. R. Co. v. Wyler, 158 U. S., 285. It is unnecessary, therefore, to determine the effect of an excuse seasonably pleaded, for failure to bring the suit within the statutory period." The case of Moliter v. R. R., 168 S. W. 250 is in point and supports the defendant's position. It was there admitted that plaintiff was employed in interstate commerce by a carrier engaged in such commerce. It appeared that plaintiff failed to plead facts bringing his action under the federal act, and proposed to amend, after verdict, so as to include the necessary allegations. The court refused the amendment and says:

154 "Plaintiff's action, as stated in his pleading, being either under the common law or the statute of Missouri, and not under the Federal statute, he cannot recover under the latter statute without changing his cause of action from law to law; and that we decided in the McAdew v. K. C. Ry., Western Ry. Co., supra, he could not do so. See also Union Pacific Ry. Co. v. Wyler, 158 U. S., 285; 15 Sup. Ct. 877; 39 L. ed. 983; St. L. and San Fran. Ry. v. Seale, 229 U. S., 156; 33 Sup. Ct. 651; 57 L. ed. 1129.

Plaintiff's contention is that, if the evidence showed his right of action was under the federal statute, he could recover, although no facts constituting such action were pleaded, and although he did not submit the case to the jury under that statute. That idea is no less than a claim that a pleading does not bind the pleader, and indeed is unnecessary, since a recovery may be had for the violation of any right which the evidence may disclose. * * *

But it is said that, conceding the error herein pointed out, judgment should nevertheless be affirmed and the cause remanded to the end that the petition be amended to conform to the proof. We think there is no authority for such course. The defect in plaintiff's case is not a mere variance; it is a total failure to prove the cause of action alleged. 'In short, the case pleaded was not proved, and the case proved, was not pleaded.' St. L. & San Fran. Ry. Co. v. Seale, 229 U. S., 161. This is made manifest by the suggestion that, under plaintiff's petition, contributory negligence does not affect the measure of his damages and only goes to defeat the action, while under the federal statute it does not defeat the action, but does affect the measure of damages."

In Allen v. R. R., 229 Pa. 97, it is held that a complaint stating a cause of action under the state law cannot be amended, after the limitation period has expired, so as to charge that defendant failed to comply with the federal safety appliance act.

The court says:

155 "It is also true that if, as claimed by the plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement not from fact to fact, but from law to law,—from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the plaintiff bases his right of

recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action.

Union P. R. Co. v. Wyler, 158 U. S., 285; 39 L. ed. 983; 15 Sup. Ct. Rep. 877;

Boston & M. R. Co. v. Hurd, 56 L. R. A., 193, 47 C. C. A., 615, 108 Fed. 116."

In Hall v. R. R., 157 Fed. 464, it is said: "The question of 'relation back' of amendments is a fiction of the law, and shall never be allowed, when to do so would, to the prejudice of a litigant, deprive him of a substantial right." It is unnecessary to recite the features in which a cause of action at common — and under our statute differs from a cause of action under the federal statute. They are numerous and important as shown by the cases of North Carolina R. Co. vs. Zachary, 232 U. S. 248; Seaboard Air Line Ry. vs. Horton, 233 U. S. 492; Seaboard Air Line Ry. vs. Tilghman, 237 U. S. 499; St. L., I., M. & S. R. Co. vs. Craft, 237 U. S. 499; Central Vt. R. Co. vs. White, 238 U. S. *238 U. S.* —, when considered in connection with Zachary vs. North Carolina R. Co., 156 N. C. 496; Horton vs. S. A. L. Ry., 162 N. C. 424; Tilghman vs. S. A. L. Ry., 167 N. C. 163; Bolick vs. R. R., 137 N. C., 370; Burnett vs. R. R., 163 N. C. 186.

3. I think the court also errs in holding that there is any evidence of negligence in the record. I fail to see wherein the defendant was wanting in the discharge of any duty it owed the plaintiff on the night when he was hurt. Thousands of persons before this plaintiff have slipped up on the ice and hurt themselves without blaming anyone but their own bad luck.

I cannot see that the defendant was negligent in not antici-
156 pating that its tank would overflow and the water would submerge the path and that the night would be freezing and the plaintiff would slip on it and injure himself. If it was the duty of the defendant to keep snow and ice off the path leading from the tank to the pump, it was its duty to keep it off of every path at every point on its right of way. It makes no difference how the water got on the path, whether through nature or from the accidental overflow of the tank, if the defendant owed the plaintiff no duty to keep this particular path free from ice, there was no breach of duty upon its part.

There is no evidence that the path being used by the plaintiff was marked out by the defendant as the path for its employees. Plaintiff's witnesses said it was the usual path. They also said that employees were free to go any way they desired in getting to the pump, and the evidence shows that there were two additional paths. There is nothing to show that the defendant had ever adopted the path or designated it as the proper one for its employees; there is nothing to show that the defendant marked it out or kept it up. It may have been, and probably was, if a path at all, one of the several ways of getting to the pump. The tank and pump were both in the open country with nothing to prevent pedestrians using any path

they saw fit, or walking in any direction they desired. Plaintiff says he was walking in the usual path from the pump to the train.

The evidence of the plaintiff shows that there is another path that he might well have taken which comes up to the other side of the tank and on the opposite side from that on which the plaintiff fell. Parks, one of the plaintiff's witnesses, testifies that there are other paths leading to the pump house. This witness also says that it was a very hard winter, the hardest winter he had ever seen around Cochran and that everything was frozen up. This evidence shows that the plaintiff had other routes to take and if he saw fit to take the one that was covered with ice, he did it with his eyes open and ought not to be permitted to recover.

The defendant had no notice that plaintiff would use that path. If it was dangerous to use, plaintiff had equal opportunity
157 with defendant to know the danger. Plaintiff had his choice of the paths leading to the pump. He was free to go where he pleased. That he selected the path in which the ice had accumulated during the day ought not to be charged against the defendant.

"The duty of a master to provide a reasonably safe place in which his servant shall work does not extend to safeguarding the route of every journey the servant may be required to make in fetching and carrying, whether messages or portable articles."

Bridge Co. v. Bainum, 146 F. 367.

4. The contention of the defendant on the issue of assumption of risk is that the condition complained of was one of the ordinary risks of an employee engaged in working around water tanks. This is well founded. Any man of ordinary intelligence is charged with knowledge of the fact that in extremely cold weather there is an accumulation of ice around water tanks and plaintiff admitted that he was well aware of that condition.

Plaintiff testified that "you find water around the water tanks, but it is on account of the carelessness of the firemen, you find it. I do not know about a plenty of it. I have been to tanks and found water around them, and that is a common thing, but it is not necessary that it should be there, but I have seen it there. In cold weather that water freezes like any other water. In weather as cold as this, water that comes down out of the heavens freezes as soon as it hits the ground. I had just gotten to Cochran, had not been there over 30 minutes. I found ice there at that tank. I do not know that I found ice anywhere else that winter."

Railroad employees assume the risks incident to the falling of snow and forming of ice on and the removal of the same from the tracks and places where employees are required to work, if such removal is made in a proper and reasonable manner.

Labatt (1st ed.) page 604 (Note.)

The injury to the plaintiff was an accident, pure and simple, an unexpected result from a known cause, for which, in my opinion, the defendant is in no sense responsible.

Mr. Justice Walker concurs in this opinion.

158 Supreme Court of North Carolina, August Term, 1915.

No. 259.

J. T. RENN
vs.
SEABOARD AIR LINE RAILWAY.

Wake County.

This cause came on to be argued upon the transcript of the record from the Superior Court of Wake County:—

Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable W. R. Allen, Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant, Seaboard Air Line Railway, and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Twenty seven 35/100 dollars ($27.35) and execution issue therefor.

J. L. SEAWELL,
Clerk Supreme Court.

159 In the Supreme Court of North Carolina, August Term, 1915.

No. 259.

J. T. RENN
vs.
SEABOARD AIR LINE RAILWAY.

Petition for Writ of Error.

To the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina:

Your petitioner, Seaboard Air Line Railway, a corporation of the States of Virginia, North Carolina and other States, respectfully shows:

This is a suit brought by J. T. Renn, an employee of the Seaboard Air Line Railway to recover damages for personal injuries alleged to have been sustained at Cochran, Va., while plaintiff was employed by the defendant. At the trial in the Superior Court of Wake County at June Term, 1915, plaintiff was permitted, over defendant's objection to amend his complaint so as to allege that at the time of his injury plaintiff was employed by the defendant in interstate commerce, and after this amendment was permitted the action was tried

under the Federal Employers' Liability Act, enacted by Congress of the United States April 22d, 1908, and the amendments thereto.

At the trial issues were submitted to the jury and answered as follows:

1. Was the plaintiff injured by the negligence of the defendant?
Answer: "Yes."

2. Did the plaintiff assume the risk of injury?
Answer: "No."

3. Did the plaintiff, by his own negligence, contribute to
160 his own injury?
Answer: "No."

4. What damages, if any, is plaintiff entitled to recover?
Answer: "$3,500."

5. At the time alleged in the complaint, was the defendant engaged in interstate commerce, and the plaintiff employed by the defendant in such commerce?
Answer: "Yes."

6. Did the plaintiff's cause of action accrue more than two years before the amendment to his complaint was filed?
Answer: "No."

From the judgment rendered upon said verdict in favor of plaintiff for the sum of $3,500.00 and the costs of the action, the defendant appealed to the Supreme Court of North Carolina:

That the Supreme Court of North Carolina, which is the highest court in the State of North Carolina, in which a decision in the said action could be had, at the August Term, 1915, of said Court, to-wit, on the 17th day of November, 1915, rendered judgment adverse to this petitioner, and affirming the judgment of said Superior Court of Wake County.

That in the proceedings had and judgment rendered, certain errors were committed to the prejudice of the petitioner, all of which more fully appears in the assignment of errors filed herewith.

That the cause of action set forth in the complaint as amended and defenses thereto set up in the amendment to the answer of the plaintiff in error, and the objections to the allowance of the amendment to the complaint arose under the statutes of the United States, to-wit, the act regulating, governing and controlling the liability of a railroad engaged in interstate commerce to an employee who receives an injury or is killed while employed in such commerce, approved by Congress, April 22d, 1908, and usually referred to as the Federal Employers' Liability Act.

That the errors complained of in this petition, and more
161 fully set forth in the assignment of errors accompanying this petition, are, that the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the Federal Employers' Liability Act in that the plaintiff was permitted to amend his complaint, after the expiration of the two year period within which an action under the federal act could be maintained, as provided by Section 6 of said act, so as to allege facts bringing the action within the provisions of said act, and in that instructions to the jury were given which were objected to by your

petitioner, which denied your petitioner the construction of said act to which it was entitled and instructions requested by your petitioner were refused, which denied your petitioner the construction of said act, to which it was entitled and your petitioner was in other ways in the trial of said action deprived of its rights under said Federal Employers' Liability Act, as more fully appears in the assignment of errors filed herewith.

Therefore, considering itself aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in the above entitled case, your petitioner hereby prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correction of the errors complained of; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated transcript of the record and proceedings herein in said Supreme Court of North Carolina may be sent to the Supreme Court of the United States, and that the decision and judgment of the Supreme Court of North Carolina may be reversed and annulled.

Assignment of Errors herewith filed.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN,
Attorney for Seaboard Air Line Railway.

STATE OF NORTH CAROLINA, *ss:*

Let the writ of error issue upon the execution of a bond
162 by the Seaboard Air Line Railway in the sum of Seven Thousand Dollars; such bond when approved to act as a supersedeas. Dated December 6th, 1915.

WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

163 In the Supreme Court of North Carolina, August Term, 1915.

No. 259.

J. T. RENN
vs.
SEABOARD AIR LINE RAILWAY.

Assignment of Errors and Prayer for Reversal.

This is an action brought by J. T. Renn against Seaboard Air Line Railway to recover damages for personal injury received at Cochran, Va., by falling on ice, while he was in the employment of the said railway as a pump repairer. It was alleged in the complaint:

That the defendant mentioned was a corporation existing and doing business under the laws of the State of North Carolina, and was operating a line of railroad in the State of North Carolina and

in the State of Virginia, and elsewhere. That on the 14th day of January, 1912, the plaintiff was in the employment of the defendant and in the discharge of the duties of his said employment it became and was proper and necessary for the plaintiff to traverse a certain piece of ground beside the railroad track of the defendant and within its right of way at or near the station known as Cochran, Virginia, and to do so hurriedly in order to get aboard a train of cars then and there being operated by the defendant; that at the said time it was snowing and the ground had become and was covered and hidden by snow; that the defendant had carelessly and negligently caused, permitted and allowed water to be poured or spilled upon the ground at said place and to become frozen, thereby covering the ground for a considerable space with a sheet of ice, and the defendant had negligently caused a highly dangerous condition to exist and the said place and condition was highly dangerous and perilous and the defendant had negligently failed to warn
164 the plaintiff in any manner of the existence of said danger; and on account of the negligence of the defendant in the particulars aforesaid, the plaintiff, while proceeding along the said ground in the exercise of ordinary prudence and care, and without notice, knowledge or information or warning of any kind of the existence of said danger, was caused to slip and fall heavily upon the ground, and thereby his collar bone and other bones were injured and dislocated, and he was bruised and wrenched and strained and sprained, and he was caused to suffer other serious, plainful, dangerous and permanent injuries to the muscles, bones, nerves and ligaments of his body, head and extremities, and caused to suffer much pain and anguish of body and mind.

At the trial and at the conclusion of plaintiff's evidence which established the facts that at the time of plaintiff's injury the defendant was engaged in interstate commerce and plaintiff was employed in such commerce, the defendant moved to dismiss the action upon the ground that the complaint set out a cause of action at common law and under the statute of North Carolina and the evidence established the fact that plaintiff was employed in interstate commerce and his action was governed by the Employers' Liability Act passed and approved by Congress of the United States, April 22d, 1908. Plaintiff was thereupon, over defendant's objection, permitted to amend his complaint so as to allege that at the time of this injury plaintiff was employed in interstate commerce. The action was then tried under the provisions of said act.

Now comes the Seaboard Air Line Railway, plaintiff in error, and files herewith its petition for writ of error and says that there are errors in the record and proceedings in the above entitled cause, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignments of error:

1. For that the Supreme Court of North Carolina erred in its construction of the Federal Employers' Liability Act, a statute of the United States, approved by Congress on the 22d day of April, 1908, especially in the construction of Sections 1, 3, 4, and 6.

2. For that by these errors the Supreme Court of North Carolina

decided against the rights set up and claimed by your petitioner under the said statute and denied to your petitioner a correct construction, interpretation, and application of the provisions of said statute.

3. For that the Supreme Court of North Carolina committed error in sustaining the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the Federal Employers' Liability Act, approved by Congress, April 22d, 1908, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action.

4. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22d, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 1 of said Act, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

5. For that the Supreme Court of North Carolina erred, and its decision was against the rights set up and claimed by your petitioner under Section 1 of the said act of Congress, because of the holdings of the Supreme Court of North Carolina in construing certain instructions given and refused upon the first issue submitted to the jury, to-wit: Was the plaintiff injured by the negligence of the defendant, which said errors are more particularly set forth as follows:

6. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's motion for judgment of nonsuit at the conclusion of plaintiff's
166 evidence upon the ground that the evidence offered by the plaintiff failed to establish negligence on the part of the defendant as alleged in the complaint. This was defendant's exception No. 9.

7. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's motion for judgment of nonsuit made at the conclusion of all the evidence. This was defendant's exception No. 17.

8. For that the Supreme Court of North Carolina erred in overruling the 18th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 1st request to charge the jury as follows:

"1. The Court charges you that if you believe the evidence in this case, the plaintiff was not injured by any negligence on the part of the defendant and you will answer the first issue 'No.'"

9. For that the Supreme Court of North Carolina erred in overruling the 22d exception of the plaintiff in error and in holding

that the trial court committed no error in refusing to give plaintiff in error's 8th request to charge the jury as follows:

"8. A railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track, and if the plaintiff slipped on such snow or ice you will answer the first issue 'No.'"

10. For that the Supreme Court of North Carolina erred in overruling the 24th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"The extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workman."

11. For that the Supreme Court of North Carolina erred in overruling the 25th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

167 "If the evidence satisfies you by its greater weight that the defendant failed in the performance of this duty, and by reason of such failure permitted ice to accumulate upon a path which was the usual path traveled by its employees to and from the pump house to the track, and by reason of such failure and as a proximate cause thereof, the plaintiff slipped and fell and injured himself, then your answer to this first issue would be 'Yes,' unless you are so satisfied, your answer to it would be 'No.'"

12. For that the Supreme Court of North Carolina erred in overruling the 26th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"Your next inquiry would be whether or not there was an accumulation of ice in that path, and upon that proposition the burden is still upon the plaintiff to satisfy you by the greater weight of the evidence of the truth of his contention. He says that there was an accumulation of ice there; that in pumping the water into the tank, the tank had been allowed to overflow, and that the ice was there three feet all around the tank and extending out some distance, and extending into this path; that it had remained there for some time. I believe one of the witnesses said that he saw it overflowing that day; that the weather was so cold that sometimes the water would freeze in falling; that the ice on the pond from which the water was pumped was some 12 or 15 inches thick, and the weather was bitter cold."

13. For that the Supreme Court of North Carolina erred in overruling the 27th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"Now, the plaintiff contends that there was no reason why, in the exercise of ordinary care, the defendant might not have made that place safe for the movement of its employees; that it is testi-

168 mony that they cut the ice away in approaching the depot a short distance off, so that people having business with the agent, or passengers taking or leaving the train, could get away

from the depot in the open place from which the ice had been cut. That the defendant had present that day a section force which could have been utilized to open this path and cut the ice away. That it had employees there connected with the work train which had been there for some time during that evening, that could have been utilized for the purpose of opening this path and removing the ice, which the plaintiff alleges had accumulated there, and that it failed to exercise the care, reasonable care and prudence which I have told you it was its duty to exercise in order to make a safe place for its employees at that time along that path."

14. For that the Supreme Court of North Carolina erred in overruling the 28th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"The plaintiff contends that this accumulation of ice was caused, not by the general weather conditions that prevailed, but in a large part, if not entirely, by the failure of the pumper to so regulate the pumping of the water as to keep it from running out of the tank, and that by failure to exercise proper care he had caused the tank to overflow, and that the water had fallen down around it and had frozen, and that near the tank and around it on all sides of it the ice was about three feet deep, and extended out into this path."

15. For that the Supreme Court of North Carolina erred in overruling the 29th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"If, as I said before, the evidence satisfies you by its greater weight, the burden being upon the plaintiff, of the truth of the plaintiff's contentions, as I have recited them, you will answer it (first issue) 'Yes.' "

169 16. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress approved April 22d, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 3 of said act, thereby denying to Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and especially set up in this proceeding.

17. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 3 of said Federal Employers' Liability Act approved by Congress of the United States, April 22d, 1908, because of the holdings of the Supreme Court of North Carolina in construing said act and because of certain instructions given by the trial court and approved by said Supreme Court upon the effect of contributory negligence, upon the amount of damage to which defendant in error would be entitled and upon the duty of the jury

in answering the third issue to-wit: What amount of damages is the plaintiff entitled to recover of the defendant, which said errors are as follows:

18. For that the Supreme Court of North Carolina erred in overruling the 20th exception of plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 3rd request for special instruction to the jury as follows:

"If you do not answer the issue of assumption of risk 'Yes' and do answer the issue of negligence 'Yes,' then the court instructs you that the plaintiff by his own negligence contributed to his injury and you will answer the issue of contributory negligence 'Yes.'"

19. For that the Supreme Court of North Carolina erred in its construction and application of Section 4 of the Federal
170 Employers' Liability Act of 1908 in overruling the 19th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 2d request for special instruction to the jury as follows:

"The court charges you that upon all the evidence in this case, the plaintiff assumed the risk of injury from falling on ice at the time and place testified to by plaintiff and you will answer the issue of assumption of risk "yes." This was defendant's exception No. 19.

20. For that the Supreme Court of North Carolina erred in its construction and application of Section 4 of the Federal Employers' Liability Act in holding that the trial court did not commit error in instructing the jury as follows:

"Now, if by the exercise of ordinary care and prudence, which was the duty that he owed, he could have seen that the ice had accumulated at that place, and could have become aware that there was risk in walking over it, then he would be charged with such facts as the exercise of ordinary care would have disclosed to him, and if you are satisfied that they would have disclosed to him that the ice was there, and that it was slippery, then you would find that he had assumed the risk of injury in passing over it, and, in that event, you would answer the second issue 'Yes,' that he assumed the risk of injury. Unless you are so satisfied, you will answer it 'No.'" This was defendant's exception No. 30.

21. For that the Supreme Court of North Carolina erred in its construction and application of Section 4 of the Federal Employers' Liability Act in holding that the trial court did not commit error in instructing the jury as follows:

"If the evidence does not satisfy you that exercising ordinary care he would have become aware, or could have become aware of the conditions there, and the risk arising, then you would answer this second issue 'No.'" This was defendant's exception No. 31.

22. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case because it de-
171 nied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22d, 1908, known as the Fed-

eral Employers' Liability Act, as properly construed and in adjudging the liability of the plaintiff in error by an erroneous construction and application of Section 6 of said act, thereby denying to the Seaboard Air Line Railway the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

23. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 6 of said Federal Employers' Liability Act because of the holdings of said court in construing said act and in upholding the trial court in permitting an amendment to the complaint, and in refusing motion of the plaintiff in error to dismiss the action and in giving certain instructions to the jury and in refusing to give certain instructions requested by plaintiff in error upon the 6th issue, to-wit: Did plaintiff's cause of action accrue more than two years before the amendment of his complaint was filed?, which said errors are as follows:

24. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling plaintiff in error's motion for judgment of nonsuit and to dismiss the action made at the conclusion of plaintiff's evidence upon the ground that the cause of action alleged in the complaint is based upon the common law and the statute law of the State of North Carolina, and the plaintiff's proof shows that he was employed by a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States at the time of his injury, and was at the time of his injury employed by such carrier in such commerce, and the cause of action proved arises under the
172 Act of Congress of the United States of April 22, 1908, known as the Federal Employers' Liability Act; that there is no allegation in the complaint that the plaintiff was employed in interstate commerce and no allegation of facts constituting a cause of action under the Act of Congress; that the case proved was not pleaded and there is a total variance in pleading and proof. This was defendant's exception No. 9.

25. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of the amendment to the complaint alleging that at the time plaintiff sustained the injury complained of he was employed in interstate commerce, upon the ground that it introduces a new cause of action, to-wit: a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section 6 of the said Act of Congress providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from the plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued

on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the act of Congress of April 22, 1908. This was defendant's exception No. 10.

26. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of the said amendment upon the ground that the Court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the act of Congress of April 22,
173 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. This was defendant's exception No. 11.

27. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the said amendment to the complaint upon the ground that it contains averments of facts which are not contained in the original complaint and which defendant should have an opportunity to prepare to defend and asks for a continuance if the amendment is allowed. This was defendant's exception No. 12.

28. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of the following amendment to plaintiff's complaint upon the ground that it introduces a new cause of action, to-wit: a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States, while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section 6 of the said Act of Congress, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from the plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the Act of Congress of April 22, 1908:

"3*a*. That at the time the plaintiff suffered said injuries he was in the regular employment of the defendant as a pump repairer working as from time to time ordered by the defendant on
174 the pumps used in connection with the line of defendant's railroad extending between the city of Raleigh, in the State of North Carolina, and the city of Richmond, in the State of Virginia; and at the time the plaintiff suffered said injuries he had been sent by the defendant from his home in Raleigh, North Carolina, to Cochran, Virginia, to repair a pump of the defendant at said Cochran, Virginia, and he had visited and inspected said pump and discovered the need of a coupling or fitting or flange or union which

was not obtainable at Cochran, Virginia, and which he thought (as afterwards proved true) the defendant had at Skelton, Virginia; and the plaintiff at the time of suffering said injuries, was going along the usual path from said pump past a water tank of the defendant at Cochran, Virginia, to board at Cochran, Virginia, one of defendant's trains and to go to said Skelton, Va., to get said needed part or appliance to be used by him in repairing a pipe connected with said pump at Cochran, Va., which pump had theretofore been and was thereafter to be used by defendant in pumping water into said tank at Cochran, Va., from which tank water was from time to time taken by trains of the defendant, some of which trains were at such times being operated by defendant while engaged in interstate commerce, and that the train which the plaintiff was going to board and did board, was at said time engaged and operated by the defendant in interstate commerce; and that at said time the defendant was a railroad company engaged as a common carrier by railroad of freight and passengers in interstate commerce between the State of Virginia and the State of North Carolina. This was defendant's exception No. 13.

29. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of said amendment upon the ground that the court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a de-
175 parture in the substance of the action and a departure in the law on which it is founded. This was defendant's exception No. 14.

30. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of said amendment upon the ground that it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend and asks for a continuance if the amendment is allowed. This was defendant's exception No. 15.

31. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in refusing defendant's motion for judgment of nonsuit and to dismiss this action upon the ground that plaintiff failed to bring his action for injuries sustained while he was employed by the defendant in interstate commerce which arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, within two years from the date the cause of action accrued, as required by Section 6 of said Act. This was defendant's exception No. 17.

32. For that the Supreme Court of North Carolina erred in overruling plaintiff in error's 21st exception and in sustaining the action of the trial court in refusing to instruct the jury as requested by plaintiff in error as follows:

"The Court instructs you upon all the evidence in this case you will answer the 6th issue 'Yes.'"

33. For that the Supreme Court of North Carolina erred in overruling plaintiff in error's 35th exception and in holding that the trial court did not commit error in instructing the jury as follows:

"As to the sixth issue, I charge you that if you find the facts to be as testified to by the witnesses, you will answer that 'No,' that is as to whether the plaintiff's cause of action accrued more than two years before this complaint was filed. If you find the facts to be as testified to by the witnesses, you will find the fifth issue 'Yes,'
176 and the sixth issue 'No.'"

34. For that the Supreme Court of North Carolina erred in its construction and application of Section 1 of the Federal Employers' Liability Act in holding that the trial court committed no error in admitting incompetent evidence for the purpose of establishing negligence on the part of plaintiff in error, as follows:

"Q. Why was the tank running over?

"By the Court: Do you know?

"A. Yes. Because the pumper was neglecting his duty, and let it continue to run after the tank was full." This was defendant's exceptions Nos. 6 and 7.

35. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employer's Liability Act in holding that the trial court committed no error in admitting incompetent evidence for the purpose of showing that defendant in error did not contribute to his injury by his own negligence as follows:

"Q. Did you cause your own fall in any way. A. No. I did not. I was just as careful walking as I could be." This was defendant's exception No. 1.

36. For that the Supreme Court of North Carolina erred in its construction and application of Section 1 of the Federal Employers' Liability Act in holding that the trial court committed no error in instructing the jury on the issue of damages as follows:

"The plaintiff is entitled to recover as damages, if entitled to recover at all, one compensation for all injuries resulting from the defendant's negligent conduct. This damage embraces indemnity for loss of time, inability to perform labor or capacity to earn money, for injuries suffered by body or mind, which are the immediate and necessary consequence of the injury sustained. The plaintiff is to have a reasonable compensation for loss of bodily powers, actual suffering of mind or body, and also for any expense reasonably
177 necessary which you find he may have incurred as a result of the injury sustained, which injury you find is the immediate necessary consequence of the defendant's negligent conduct, if it was negligent, to recover as damages one compensation for all loss which you find, by the greater weight of the evidence the plaintiff has sustained in consequence of the defendant's negligent act." This was defendant's exception No. 32.

37. For that the Supreme Court of North Carolina erred in its construction and application of Section 1 of the Federal Employers' Liability Act in holding that the trial court committed no error in instructing the jury on the issue of damages as follows:

"In the nature of things, it is impossible for the law to lay down any definite rule, but it says to the jury that they should award a reasonable compensation, with the emphasis on the word 'reasonable.' He is to be compensated for all that he has suffered, if you find that he has suffered, but it ought not to be exaggerated on account of any sympathy, that you may have with him, but it ought to be reasonable, based upon the evidence, and you may use your common sense and your common observation of men, and what suffering that men undergo, and of any suffering that you may have had yourself in order to enable you to determine what would be a reasonable compensation for such pain and suffering as he sustained as the direct and immediate consequence of this injury, if you find that such pain and suffering were the direct and immediate results of the negligent conduct of the defendant." This was defendant's exception No. 33.

38. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling plaintiff in error's motion for judgment non obstante veredicto upon the coming in of the verdict. This was defendant's exception No. 36.

39. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's motion for a new trial for errors occurring during the trial and errors
178 in the admission and exclusion of evidence, and in the court's charge to the jury, and in permitting plaintiff to amend his complaint so as to bring his cause of action within the provisions of the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and in refusing defendant's motions for judgment of nonsuit, and to dismiss the action. This was defendant's exception No. 39.

40. For that the Supreme Court of North Carolina erred in overruling exception No. 40 of the plaintiff in error and in holding that the trial court properly signed the judgment in this case in favor of the defendant in error.

41. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action because the said judgment denied to the plaintiff in error, Seaboard Air Line Railway, a construction of the Federal Employers' Liability Act to which it was entitled and which if granted would have defeated the right of defendant in error to recover in this action.

42. The Supreme Court of North Carolina, for the various reasons above set forth committed error in rendering the final judgment it did render against the plaintiff in error in this action.

Wherefore, for these and other manifest errors appearing in the record, the Seaboard Air Line Railway prays that the said judgment of the Supreme Court of North Carolina, dated the 17th day of November, 1915, be reversed, and a judgment rendered in favor of plaintiff in error, and for costs.

December 4th, 1915.

MURRAY ALLEN,
Attorney for Seaboard Air Line Railway.

179 [Endorsed:] Seaboard Air Line Railway, Plaintiff in Error, vs. J. T. Renn, Defendant in Error. Petition for writ of error, Assignment of Errors, and Prayer for Reversal. Filed Dec. 7 1915 in Supreme Court North Carolina. Office of Murray Allen, Attorney and Counsellor at Law, 709-711 Citizens National Bank Building, Raleigh, N. C.

180 The Supreme Court of North Carolina, Fall Term, 1915.

No. 259.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error,
vs.
J. T. RENN, Defendant in Error.

Bond.

Know all men by these presents, that we, Seaboard Air Line Railway, a corporation of the State of Virginia and other States, the principal office of which is in the City of Portsmouth, State of Virginia, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto J. T. Renn in the full and just sum of Seven Thousand Dollars (7,000.00) to be paid to the said J. T. Renn, his certain attorney, executors, administrators, or assigns; for the payment of which sum, well and truly to be made, we bind ourselves, and each of our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 6th day of December, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a hearing had before the Supreme Court of North Carolina in a suit depending in said Court, between the said J. T. Renn, as plaintiff, and Seaboard Air Line Railway, as defendant, a final judgment was rendered against the said Seaboard Air Line Railway and the said Seaboard Air Line Railway seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the said final judgment in the aforesaid suit, and a citation having been directed to the said J. T. Renn citing and admonishing him to be and appear within thirty days from the date thereof.

Now, therefore, the condition of this obligation is such that if the Seaboard Air Line Railway shall prosecute its said writ of error to effect, and answer all damages and costs which may be
181 adjudged against it, if it fail to make its plea good, then this obligation is to be void; else to remain in full force and effect.

SEABOARD AIR LINE RAILWAY, [SEAL.]
By MURRAY ALLEN, *Attorney.*
FIDELITY & DEPOSIT COMPANY OF MARYLAND, [SEAL.]
(S.) By ALBERT L. COX, *Attorney in Fact.*
(S.) By J. McKIMMON, *Agent.*

Bond approved and to act as supersedeas, this 6th day of December, 1915.

(S.) WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

182 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between J. T. Renn, plaintiff, and Seaboard Air Line Railway, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised, under said State, upon the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said defendant, Seaboard Air Line Railway, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that
183 error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of December, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

ALEX. S. BLOW,
Clerk District Court United States, Eastern District of North Carolina.

Allowed by
WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

This 6th day of December, 1915.

STATE OF NORTH CAROLINA:

I, Joseph L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify that the within writ of error, together with the petition therefor and the assignments of error, and the appellant's bond, together with copies of all of the same for the undersigned Clerk, and also together with copies of all of the same for J. T. Renn, Defendant in Error, were on the 7th day of December, 1915, lodged in my office as Clerk of the Supreme Court of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk of the Supreme Court of North Carolina.

184 [Endorsed:] Seaboard Air Line Railway, Plaintiff in Error, vs. J. T. Renn, Defendant in Error. Writ of Error. Filed Dec. 7, 1915, in Supreme Court, North Carolina. Office of Murray Allen, Attorney and Counsellor at Law, 709-711 Citizens National Bank Building, Raleigh, N. C.

185 UNITED STATES OF AMERICA, *ss:*

To J. T. Renn, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error, filed in the office of the Clerk of the Supreme Court of North Carolina, wherein Seaboard Air Line Railway is plaintiff in error and you are defendant in error, to show cause if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter Clark, Chief Justice of the Supreme Court of North Carolina, this 6th day of December, in the year of our Lord one thousand nine hundred and fifteen.

WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

Attest:

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

We, Robert N. Simms and Douglass & Douglass, attorneys of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation and acknowledge recipt of a true copy of same, together with copy of petition for writ

of error, assignment of errors, prayer for reversal, bond and writ of error. No rights waived. This 6th day of December, 1915, at Raleigh, N. C.

ROBERT N. SIMMS,
DOUGLASS & DOUGLASS,
Attorneys for J. T. Renn, Defendant in Error.

186 [Endorsed:] Seaboard Air Line Railway, Plaintiff in Error, vs. J. T. Renn, Defendant in Error. Citation. Filed Dec. 7, 1915, in Supreme Court, North Carolina. Office of Murray Allen, Attorney and Counsellor at Law, 709-711 Citizens National Bank Building, Raleigh, N. C.

187 Supreme Court of North Carolina.

I, J. L. Seawell, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect transcript of the record of appeal, together with the petition for writ of error, assignment of errors, prayer for reversal, bond, writ of error, and citation in the case lately pending in this court entitled J. T. Renn vs. Seaboard Air Line Railway, as appears from originals on file in this court.

Witness my hand and the seal of said Court at office in Raleigh, this December 8th, 1915.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

Endorsed on cover: File No. 25,056. North Carolina Supreme Court. Term No. 773. Seaboard Air Line Railway, plaintiff in error, vs. J. T. Renn. Filed December 20th, 1915. File No. 25,056.

Office Supreme Court, U. S.
FILED
MAR 29 1916
JAMES D. MAHER
CLERK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,

v.

J. T. RENN,
Defendant in Error.

No. 773

In Error to the Supreme Court of North Carolina

Brief of Plaintiff in Error on the Merits

MURRAY ALLEN,
Counsel for Plainttff in Error.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,

v.

J. T. RENN,
Defendant in Error.

No. 773

In Error to the Supreme Court of North Carolina

Brief of Plaintiff in Error on the Merits

STATEMENT OF THE CASE

This is an action brought by the plaintiff to recover damages for personal injuries, alleged to have been received at Cochran, Va., on June 14th, 1912. Plaintiff testified that he had gone to Cochran for the purpose of repairing a pump which supplied water to a tank, from which tank engines on the defendant's railroad drawing interstate trains were supplied with water; that he reached Cochran late in the

evening and went at once to the pump; that he found upon examining the pump that it would be necessary for him to secure parts at another station; that at this time one of defendant's trains was standing on the track at Cochran, and was about to start to the point to which he desired to go; that he left the pump and was walking by the usual path around the water tank and was passing between the water tank and tool house to reach the train, when he slipped on the ice and sustained the injuries complained of. Plaintiff testified that it was an extremely cold night and all of the witnesses in the case testified that there was a great deal of ice everywhere around Cochran. The basis of plaintiff's complaint is that ice was negligently permitted to accumulate and remain in the path. Plaintiff testified that at the time he fell he was hurrying up a slight incline in order to catch the train; that the ice was covered with snow and he did not see it at the time of the fall. Frank Parks, a witness for the plaintiff, testified that he was in the employment of the defendant at Cochran and that he had seen the ice at this point on the day of plaintiff's injury; that the ice was formed from the overflow of the tank. The defendant's evidence tended to show that if the tank overflowed the water would accumulate in a different direction from the point at which plaintiff fell. The defendant contended that the condition of the weather was such that it was impossible to prevent ice forming upon the ground around the water tank; that the plaintiff had knowledge that ice would be found around water tanks in cold weather, and that he assumed the risk of injury by slipping on the same.

There is no evidence that the path being used by the plaintiff had been marked out by the defendant for the use of its employees. Plaintiff and his witnesses said it was the usual path. They also said that employees were free to go any way they desired in getting from the pump, and the evidence shows that there were two additional paths (record, page 32). The evidence does not show that the defendant

had ever adopted this path or designated this or any other path as the proper one for its employees. Defendant did not, so far as the evidence shows, mark it out or maintain it. It was one of several ways subject to use by pedestrians in getting from the station and tank to the pump house. The land around the tank and pump was open and the plaintiff was free to go in any direction or by any path in getting from the pump to defendant's train. On page 25 of the record plaintiff describes one of the paths coming up to the tank on the opposite side from that on which he fell.

Issues of negligence, contributory negligence, assumption of risk and damages were submitted, and verdict rendered in favor of the plaintiff for $3,500, from which the defendant appealed to the Supreme Court of North Carolina.

The Supreme Court of North Carolina affirmed this judgment and the case is now before this Court on writ of error.

It appeared from plaintiff's evidence that he was employed in interstate commerce at the time of the alleged injury. At the conclusion of plaintiff's evidence, motion was made by the plaintiff to amend his complaint so as to state facts which would bring the action within the provisions of the Federal Employers' Liability Act. Defendant objected to the allowance of this amendment upon the various grounds hereinafter set out. The objection was overruled and the plaintiff was permitted to amend.

Plaintiff's injuries were sustained January 14, 1912. Summons in this action was issued, commencing the suit, March 14, 1913, and the original complaint was filed March 26, 1913. (Record, pages 1 and 3.) This case was tried at June Term, 1915, of the Superior Court of Wake Couty. (Record, page 15.)

The original complaint, filed by plaintiff, was in the following language:

> "The plaintiff, for his complaint, says:
>
> 1. That he is, and at the times hereinafter mentioned was a resident of Wake County, North Carolina.

2. That the defendant is, and at the times hereinafter mentioned, was a corporation existing and doing business under the laws of the State of North Carolina, and was operating a line of railroad in the State of North Carolina and in the State of Virginia, and elsewhere.

3. That on the 14th day of January, 1912, the plaintiff was in the employment of the defendant and in the discharge of the duties of his said employment it became and was proper and necessary for the plaintiff to traverse a certain piece of ground beside the railroad track of the defendant and within its right of way at or near the station known as Cochran, Virginia, and to do so hurriedly in order to get aboard a train of cars then and there being operated by the defendant; that at the said time it was snowing and the ground had become and was covered and hidden by snow; that the defendant had carelessly and negligently caused, permitted and allowed water to be poured or spilled upon the ground at said place and to become frozen, thereby covering the ground for a considerable space with a sheet of ice, and the defendant had negligently permitted and allowed the said ice to be and remain upon the said ground at the said place, and to become and be covered and hidden by the snow, and had thereby negligently caused a highly dangerous condition to exist and the said place and condition was highly dangerous and perilous, and the defendant had negligently failed to warn the plaintiff in any manner of the existence of said danger; and on account of the negligence of the defendant in the particulars aforesaid, the plaintiff, while proceeding along the said ground in the exercise of ordinary prudence and care, and without notice, knowledge or information or warning of any kind of the existence of said danger, was caused to slip and fall heavily upon the ground, and thereby his collar bone

and other bones were injured and dislocated, and he was bruised and wrenched and strained and sprained, and he was caused to suffer other serious, painful, dangerous, and permanent injuries to the muscles, bones, nerves and ligaments of his body, head and extremities, and caused to suffer much pain and anguish of body and mind.

4. That on account of the negligence of the defendant as aforesaid, the plaintiff has been damaged in the sum of ten thousand $10,000) dollars.

Wherefore, the plaintiff prays judgment that he recover of the defendant the sum of ten thousand dollars damages, and the costs of this action, and that he have such other relief as may be proper."

The defendant filed answer to this complaint, denying that plaintiff was injured by any negligence on its part and pleading assumption of risk and contributory negligence as defenses. (Record, page 5.) No reference is made in the answer to the Federal Act, and no facts are set forth which would make the provisions of it applicable.

It developed on cross examination of plaintiff, and from the testimony of plaintiff's witnesses, that he was employed in interstate commerce at the time of his injury and the defendant was engaged in interstate commerce. This made the case one arising under the Federal Employers Liability Act (35 U. S. Stat. at L., C. 149), and at the conclusion of the evidence defendant moved to nonsuit plaintiff upon the ground, among others, that he had pleaded a cause of action under the common law and State statute and had proved a case under a Federal Statute, and that this was a fatal variance.

Defendant's motion for judgment of nonsuit was set out in the following language:

"Defendant moves for judgment of nonsuit upon the ground that the evidence offered by the plaintiff fails to establish negligence on the part of the defendant as alleged

in the complaint. The defendant moves for judgment of nonsuit and to dismiss the plaintiff's action upon the further ground that the cause of action alleged in the complaint is based upon the common law and the statute law of the State of North Carolina, and the plaintiff's proof shows that he was employed by a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States at the time of his injury and was at the time of his injury employed by such carrier in such commerce, and the cause of action proved arises under the Act of Congress of the United States of April 22, 1908, known as the Federal Employers' Liability Act; that there is no allegation in the complaint that the plaintiff was employed in interstate commerce and no allegation of facts consituting a cause of action under the Act of Congress; that the case proved was not pleaded and there is a total variance in pleading and proof."

Motion overruled and defendant excepts. (Exception No. 9, record, page 37.)

This motion for judgment of nonsuit was renewed at the conclusion of all the evidence. (Exception No. 17, record, page 44.)

When the motion for judgment of nonsuit was first made plaintiff moved to amend his complaint so as to allege that he was employed in interstate commerce at the time of his injury and thereby bring his case within the terms of the Federal Act. Defendant objected to this amendment upon the following grounds:

1. That it introduces a new cause of action, to-wit, a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States, while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and

is barred by the provisions of section 6 of the said Act of Congress, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from plaintiff's evidence and from the complaint filed in this action, that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the Act of Congress of April 22, 1908. (Exception No. 10, record, page 38.)

2. That the court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. (Exception No. 11, record, page 38.)

3. That it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend, and asks for a continuance if the amendment is allowed. (Exception No. 12, record, page 38.)

The court permitted plaintiff, over defendant's objection and exception, to file the following amendment to his complaint:

"3a. That at the time plaintiff suffered said injuries he was in the regular employment of the defendant as a pump repairer working as from time to time ordered by the defendant on the pumps used in connection with the line of defendant's railroad extending between the city of Raleigh, in the State of North Carolina, and the city of Richmond, in the State of Virginia, and at the time the plaintiff suffered said injuries he had been sent by the defendant from his home in Raleigh, North Carolina, to Cochran, Virginia, to repair a pump of the defendant at said Cochran, Virginia, and he had visited and inspected said pump and dis-

covered the need of a coupling or fitting or flange or union which was not obtainable at Cochran, Virginia, and which he thought (as afterwards proved true) the defendant had at Skelton, Virginia; and the plaintiff, at the time of suffering said injuries, was going along the usual path from said pump past a water tank of the defendant at Cochran, Virginia, to board at Cochran, Virginia, one of defendant's trains and to go to said Skelton, Virginia, to get said needed part or appliance to be used by him in repairing a pipe connected with the said pump at Cochran, Virginia, which pump had theretofore been and was thereafter to be used by the defendant in pumping water into the said tank at Cochran, Virginia, from which tank water was from time to time taken by trains of the defendant, some of which trains were at such times being operated by defendant while engaged in interstate commerce, and that the train which the plaintiff was going to board and did board was at said time engaged and operated by the defendant in interstate commerce; and that at said time defendant was a railroad company engaged as a common carrier by railroad of freight and passengers in interstate commerce between the State of Virginia and the State of North Carolina."

Defendant again objected to this amendment upon the grounds above set forth and again excepted to the action of the court in overruling its objections. (Exceptions Nos. 13, 14 and 15, record, page 41.) Defendant then filed answer to this amendment to the complaint admitting that plaintiff was employed in interstate commerce at the time of his injury and pleading the provisions of Section 6 of the Federal Employers' Liability Act, providing that an action under the act must be brought within two years as a bar to plaintiff's right to maintain the action set forth in the amendment to his complaint. (Record, page 10.)

An examination of the assignments of error will show that they may be appropriately grouped under the following heads:

1. The right to permit a complaint stating a cause of action under the state law and at common law to be amended so as to state a cause of action under the Federal Employers' Liability Act after the expiration of more than two years from the time the cause of action accrued.

2. The sufficiency of the evidence, as matter of law, to be submitted to the jury on the question of negligence of the defendant in failing to keep the path on which plaintiff was walking at the time he sustained injury free of ice.

3. The assumption of risk by plaintiff of injury from falling on ice and snow at point near defendant's water tank.

4. The admissibility of evidence on the question of negligence, which the defendant contends denied it a proper construction and application of the Federal Act.

5. The failure of the court to properly instruct the jury on the measure of damages under the Federal Act.

Motion to Dismiss for Want of Jurisdiction.

It has been conclusively decided by the repeated adjudications of this Court that cases from the State Courts involving the operation and effect of the Federal Employers' Liability Act are reviewable by the Supreme Court on writ of error.

St. Louis, Iron Mountain & Southern Ry. v. McWhirter, 229 U. S., 265.

St. Louis, Iron Mountain & Southern Ry. v. Taylor, 210 U. S., 292.

Seaboard Air Line Railway v. Duval, 225 U. S., 483.

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

The defendant resisted the amendment of plaintiff's complaint upon the ground that it denied the protection of Section 6 of the Federal Act. After this amendment was permitted, the case was tried as one arising under the Federal Act.

It is the contention of plaintiff in error that it has been denied a proper construction and application of the Federal Employers' Liability Act, and the right to be shielded from responsibility under the act when properly applied, as shown by its exceptions based upon the following grounds:

1. Error in refusing to hold that there was not sufficient evidence of negligence to be submitted to the jury.

2. Error in permitting plaintiff to amend his complaint, which stated a cause of action under the state statute and at common law, so as to allege a cause of action based upon the Federal Employers' Liability Act after the expiration of more than two years from the time the cause of action accrued, thereby denying the defendant the protection of Section 6 of the Federal Act.

3. Error in refusing to hold as a matter of law that plaintiff assumed the risk of falling on ice and snow.

4. Error in instructing the jury on the measure of damages.

These assignments of error will be discussed more fully under appropriate heads in other parts of this brief.

The question of jurisdiction to review cases of this class has received the consideration of this court in a recent opinion by the Chief Justice in which it is said:

> "Is there jurisdiction to review the action of the court below in affirming the judgment of the trial court, which was entered on the verdict of the jury, and if so, was error below committed, are the questions for decision.
>
> "The suit was brought to recover damages alleged to have been suffered by the death of Lewis H. Padgett, a railroad engineer in the service of the defendant company, the plaintiff in error, caused by his having fallen during the early morning hours into a drop pit in a locomotive roundhouse belonging to the company. The negligence charged was not only the failure to cover the pit, but also to properly light the round-

house. If our jurisdiction attached, it can only be because the right to recover was based upon the Act of Congress commonly known as the Employers' Liability Act, it having been averred that the deceased was an employee of the company, actually engaged in interstate commerce. But, as pointed out in *St. Louis, I. M. & S. R. Co. v. McWhirter,* 229 U. S., 265, 275, 57 L. Ed., 1179, 1185, 33 Sup. Ct. Rep., 85[illegible] although the cause of action relied upon was based upon the Federal Statute, nevertheless, 'as it comes here from a State court, our power to review is controlled by Rev. Stat., Section 709 (Section 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, Section 1214)) and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal Statute to which his recourse by the pleadings was exclusively confined, or the converse; that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result. *Seaboard Air Line R. Co. v. Duval,* 225 U. S., 477 56 L. Ed., 1171, 32 Sup. Ct. Rep., 790; *St. Louis, I. M. & S. R. Co. v. Taylor,* 210 U. S., 281, 52 L. Ed.,1061, 28 Sup. Ct. Rep., 616, 21 Am. Neg. Rep., 464. "The existence of jurisdiction to review under the principles just stated depends not merely upon form, but upon substance; that is, in this class of cases, as in others, the general rule controls that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous. There is no doubt that the assignments of error on their face embrace Federal questions which give jurisdiction to review. We therefore exercise jurisdiction and come to consider the questions on their merits, incidentally

pointing out in doing so the reasons why the questions are not of such a frivolous character as not to afford a basis for the authority to examine and dispose of them."

Seaboard Air Line Ry. v. Padgett, 35 S. C. Rep., 481.

Seaboard Air Line Ry. v. Koennecke, decided December 13, 1915.

Motion to Affirm.

We do not feel that this motion is seriously insisted upon by the defendant in error. The questions presented by the writ of error are important to the plaintiff in error and were so regarded by the Supreme Court of North Carolina, as is illustrated by the dissenting opinion of Mr. Justice Brown, concurred in by Mr. Justice Walker, in which the plaintiff's right to recover damages under the Federal Act is denied in a strong argument well supported by the decisions of various State courts and of the United States Supreme Court. The questions presented are manifestly not frivolous. The fact that the decision is by a divided court, should relieve the plaintiff in error of the charge that the questions are frivolous and that the writ of error is taken only for delay. (Seaboard Air Line Railway v. Padgett, *supra.*) We submit that an examination of the assignments of error will fully establish that the motion of defendant in error to affirm the judgment of the Supreme Court of North Carolina is without merit.

ARGUMENT.

Plaintiff Was at the Time of His Injury Employed in Interstate Commerce.

The plaintiff was in the employment of the defendant as a pumpman, whose duty it was to keep in condition for operation the pumps which supplied water to the tanks at various points in North Carolina and Virginia between Raleigh, N. C., and Richmond, Va., and between Norlina, N. C., and Portsmouth, Va. These tanks supplied water to defendant's engines when operated in intrastate and interstate commerce. At the time of his injury the pump at Cochran, Va., was in a defective condition and could not be used to supply water to the tank. Plaintiff had been sent to Cochran to remedy the defect. He had examined the pump and had found that it would be necessary for him to go to Skelton, Va., to secure the necessary material to make the repairs, and he was on his way from the pump to the train which would carry him to Skelton, Va., when he fell and sustained the injury of which he complains. The following language of Justice Van Devanter, in *Pederson v. Delaware L. & W. R. Co.*, 229 U. S., 146, settles the question of the character of plaintiff's employment:

> "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which defendand was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as engines and cars; and sound economic reasons unite with settled rules of law in demanding that

all these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done."

There is complete analogy between bridges and tracks essential for the operation of trains in interstate commerce and pumps and tanks used to supply water for the engines used in such commerce, and the language of Justice Van Devanter in the Pederson case is quite as applicable to the latter as the former. Continuing, he says:

"Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier in engaged? . . . . The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there

was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

See also the following cases:

North Carolina R. Co. v. Zachary, 232 U. S., 248;
St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S., 156;
N. Y. Central & H. R. R. Co. v. Carr, 35 S. C. Rep., 780.

Plaintiff's Complaint States a Cause of Action Under the Statute of North Carolina Defining the Liability of a Railroad to its Employees, and Also Under the Common Law.

The North Carolina Statute is as follows:

"Any servant or employee of any railroad company operating in this State who shall suffer injury to his person or the personal representative of any such employee who shall have suffered death in the course of his services or employment with such company by the negligence, caredessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void." Revisal of North Carolina of 1905, Section 2646.

This is a public law, of which the courts of North Carolina take judicial notice without its being pleaded.

Hancock v. Railroad, 124 N. C., 222.

The plaintiff's complaint was evidently drawn with this statute in view. It alleges a defect in the "ways" of the defendant company in that the defendant permitted "water to be poured or spilled upon the ground within its right of way," and "to become frozen, thereby covering the ground for a considerable distance with a sheet of ice." Certainly the statute is applicable to the facts alleged, and if the allegations had been supported by the proof the action would have been tried under this statute.

The allegations also state a common law action, and if no state statute had existed, and no reference had been made in the evidence to the employment of the plaintiff in interstate commerce, the action would have been tried to a conclusion under the common law.

There is nothing in the complaint which remotely indicates that the plaintiff brought suit under the Federal Employers' Liability Act.

The Complaint Does Not State a Cause of Action Under the Federal Statute.

> "Where a pleader seeks to state a cause of action under the statute, facts must be averred which bring the case within its provision."
>
> Chicago & Erie R. Co. v. Hamerick, Admr., 50 Ind. App. 425.

It is not necessary that the statute should be expressly referred to in the complaint in order to entitle plaintiff to recover, but it is essential that facts should be alleged which bring plaintiff's case within the act.

> Seaboard Air Line Railway v. Duvall, 225 U. S., 477;
> North Carolina R. Co. v. Zachary, 232 U. S., 248;
> Shade v. Northern P. R. Co., 206 F. 353;
> Grand Trunk W. R. Co. v. Lindsay, 233 U. S., 42.

On the same grounds, where the case made by the evidence is within the Federal act, the defendant is entitled to the benefit of its provisions, though neither party has pleaded the act.

St. L. S. F. & T. R. Co. v. Seale, 229 U. S., 156.

It is no more necessary to refer to the Federal Act than to any other statute of the forum, but it is necessary for the complaint to contain an averment of facts bringing the case within the provisions of the statute.

Missouri K. & T. R. Co. v. Wulf, 226 U. S., 570;
Morrison v. B. & O. R. Co., 40 Appeal Cases, D. C., 391, 395.

That the Carrier was Engaged in Interstate Commerce and the Employee was Employed in such Commerce at the time of the Injury are Essential Allegations.

We submit that there is no allegation in the complaint in this action that the defendant was "engaging in commerce between any of the several states" at the time plaintiff was injured. It will be found that section 2 contains the general allegation that the defendant "was operating a line of railroad in the State of North Carolina and in the State of Virginia, and elsewhere." The only other allegation in the complaint relating to the character of business in which the defendant was engaged is contained in section 3, in which it is said that the plaintiff was preparing to board a train of cars at Cochran, Virginia, *then and there* being operated by the defendant. In the absence of evidence to the contrary, it will be presumed that a carrier operating a line of railroad in two states is engaging in intrastate commerce, and

an action against such a carrier would be considered as arising under the state law, unless the complaint contained an allegation establishing the exceptional right of action created by the Federal statute. There are no facts set forth in this complaint which could be construed as alleging that at the time of the injury to the plaintiff the defendant was "engaging" in interstate commerce. Therefore, it lacks the first essential allegation of a cause of action based upon the Federal statute. The allegations to which we have referred would be entirely consistent with the statement of a cause of action under the state statute or at common law. In fact, section 2 is the usual allegation in the statement of such causes of action.

It is certain that there is no allegation that the plaintiff was employed in interstate commerce at the time alleged in the complaint. It has been held in numerous cases that this is an essential allegation. Indeed, it is, by the language of the statute, made the fundamental fact essential to the right to maintain an action hereunder.

The Federal Employers' Liability Act of 1906 was declared to be unconstitutional because it embraced employees of a railroad engaged in interstate commerce, who were not employed in such commerce.

First Employers' Liability Cases, 207 U. S., 463.

The statute of 1908 met this objection by providing that the rights created should only exist in favor of employees of an interstate carrier "while employed by such carrier in such commerce." Certainly a restriction in its application essential to the very life of the act must be set forth in a pleading purporting to set up a claim to the benefits established by the act. No employee of a railroad engaged in interstate commerce is entitled to the benefits of the Federal Act unless at the time the injury was sustained he was employed by such carrier in such commerce.

When the sufficiency of this complaint is considered in the light of the recent decision of the United States Supreme Court in *Brinkmeier v. R. R.*, 224 U. S., 268, it becomes manifest that the very allegation which entitles the plaintiff to bring his action under the Federal Act has been omitted. Mr. Justice Van Devanter says:

> "This was an action to recover for personal injuries sustained by a brakeman while coupling two freight cars on a side track of the defendant railway company at Hutchinson, Kansas. The defendant prevailed in the state courts (81 Kan., 101, 105 Pac., 221), and the plaintiff brings the case here. The injury occurred November 12, 1900, and the action was begun March 15, 1901.
>
> The question first presented for decision is whether the petition stated a cause of action under the original safety appliance act of March 2, 1893, 25 Stat. at L., 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174, which made it unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact," etc. The petition, if liberally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad; that the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then or at any time used in moving interstate traffic. The Supreme Court of the State held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right. The terms of that act were such that its applica-

tion depended, first, upon the carrier being engaged in interstate commerce by railroad; and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce. *Southern R. Co. v. United States,* 222 U. S., 20, 25 ante, 72, 74, 32 Sup. Ct. Rep., 2. The act was amended March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp., 1909, p. 1143, so as to include all cars 'used on any railroad engaged in interstate commerce,' but the amendment came too late to be of any avail to the plaintiff.

"In 1908, after the case had been twice tried without any decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the state, it is not subject to review by us. *Texas & N. O. R. Co. v. Miller,* 221 U. S., 408, 416, 55 L. Ed., 789, 796, 31 Sup. Ct. Rep. 534.

"It is also held that the evidence produced upon the third trial was not sufficient to sustain a recovery under the petition, and error is assigned upon this. As the petition did not state a cause of action under the safety appliance act, but at most a right of recovery at common law, the ruling upon the sufficiency of the evidence did not involve a Federal question, and so is not open to re-examination in this court.

Finding no error in the record in respect of any Federal right, the judgment must be affirmed."

The like reason applies to the Employers' Liability Act which is in *pari materia* with the Safety Appliance Act.

N. C. R. Co. v. Zachary, 232 U. S., 248.

An examination of the cases decided by the Supreme Court construing the Employers' Liability Act will show that in the complaint in each case there was either a specific reference to the Federal statute as the basis of the cause of action, or the averment of facts showing that the defendant was engaged in interstate commerce, and the employee was employed in such commerce at the time the cause of action accrued.

> "An allegation that at the time of the injuries complained of plaintiff was injured while employed in interstate commerce, is insufficient to state a cause of action under the Federal Act in the absence of any allegation that the defendant was a common carrier engaged in interstate commerce by railroad."

Walton v. Southern Ry. Co., 179 Fed. Rep., 175.

While the construction of pleadings in order to determine the cause of action stated may ordinarily be a question of State practice, this is not true where by an erroneous construction of pleadings the party objecting is deprived of a right created by a Federal Statute. In this case, we submit that this Court will determine for itself whether the plaintiff's action, based upon the Federal Statute was brought within two years.

The Court Will Look Only to Pleadings to Determine the Basis of the Plaintiff's Cause of Action.

"To determine whether this action was originally brought under the state statute or the Federal statute, the courts will look to the plaintiff's own statement of his cause of action."

Hall v. L. & N. R. R. Co., 157 Fed, Rep., 464, 466.

"In constructing pleadings, it is to be presumed that the pleader has stated his case in the manner most favorable to himself."

Smith v. Buttner, 90 Cal., 95.
Chamblin v. Blair, 58 Ill., 385.
4 Encyc. Pl. & Pr., 746.

"Whether a cause of action sued on originally is the same as that set out in an amended complaint is to be determined by the averments of the pleadings and not by what the pleader intended the pleadings should contain."

Kansas City v. Hart, 60 Kan., 684.
Haley v. Hobson, 68 Me., 167.

The courts always look to the plaintiff's pleadings to determine the character of his action. This is the rule for determining the jurisdiction of the Federal courts:

"If it does not appear at the outset that the suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed."

Third St. & Suburban R. Co. v. Lewis, 173 U. S., 457, 460.

Unless it appears from the plaintiff's statement of his claim that the action is removable, this defect cannot be sup-

plied by any statement in the petition or in any subsequent pleading.

> Western Union Tel. Co. v. Southern & St. L. R. Co., 208 Fed., 266.

In *Minnesota v. Northern Securities Co.,* 194 U. S., 48, 64, it is said that the cases cited therein established beyond further question in that court "the rule that, under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill or declaration shows it to be a case of that character."

> "The jurisdictional question must be determined by the record at the time of the transfer of the case."
>
> Washington & Idaho R. Co. v. Couer D'Alene R. & Nav. Co., 160 U. S., 77.

The Cause of Action Created by the Federal Statute is Separate and Distinct from the Cause of Action Created by the State Statute or Arising Under the Common Law.

"Facts which give the right to recover under the state law, and those which give the right to recover under the Federal Statute, constitute separate and distinct causes of action, for the Federal Statute is exclusive where the incident is embraced within interstate commerce service and does not apply where it is in intrastate service."

> Midland Valley R. Co. v. Ennis, (Ark.), 159 S. W. 215.

The title of the Federal Act indicates clearly that it deals with the cause of action as well as the defenses available to

the carrier. It is: "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases." Omitting extraneous words the first section provides: Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.

In holding that this act is supreme in its sphere and supersedes the laws of the states in so far as they cover the same subject, Mr. Justice Van Devanter, in the *Mondou case,* 223 U. S., 1, says:

> "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of actions by Congress."

Again it is said in the Mondou case:

> "We conclude that *rights arising arising under the congressonal act* may be enforced, as of right, in the courts of the states, when their jurisdiction, as prescribed by local laws, is adequate to the occasion." (Italics added.)

In *Michigan Central Railroad Company v. Vreeland,* 227 U. S., 59, the United States Supreme Court says that the Employers' Liability Act "plainly declares the liability of the carrier to its injured servant," and that "by this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce." Again, the Court says: "This exertion of power which is granted in express terms,

must supersede all legislation on the same subject by states . . . . It, therefore, follows that, in respect to state legislation describing the liability of such carriers for injuries to their employees engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the state."

In *St. Louis, I. M. & S. R. Co. v. Craft,* 237 U. S., 648, opinion by Mr. Justice Van Devanter, the Supreme Court, referring to the Employers' Liability Act, says:

> "The original act was adopted by Congress April 22, 1908. In its first section it provides for two dinstinct rights of action based upon altogether different principles, although primarily resting upon the same wrongful act or neglect. It invests the injured employee with a right to such damages as will compensate him for his personal loss and suffering—a right which arises only where his injuries are not immediately fatal. And where his injuries prove fatal, either immediately or subsequently (*Michigan Central R. R. Co. v. Vreeland,* 227 U. S., 268; *Louisville & St. Louis R. R. Co.,* 152 U. S., 230, 238), it invests his personal representative, as trustee for designated relatives, with a right to such damages as will compensate the latter for any pecuniary loss which they sustain by the death. At first there was no provison for a survival of the right of action given to the injured person, and so under the operation of the rule of the common law it would die with him."

> "There can be no doubt that *a right of recovery thereunder arises* only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." (Italics added.)

Illinois Central R. Co. v. Behrens, 233 U. S., 473;
Pedersen v. D. L. & W. R. Co., 229 U. S., 150.

> "The Federal Employers' Liability Act is more than a statutory declaration of the remedy to be pursued by an injured employee, it is the source of his right."
>
> Taylor v. Taylor, 232 U. S., 363.

That the Federal Statute *creates* a cause of action is demonstrated by the very section limiting the period within which the action may be brought, Section 6. This is not a statute of limitations. While it restricts the remedy, as do statutes of limitations, it does more; it terminates the liability. What liability? Not the liability existing at common law, but the liability created by the act itself. There can be no doubt upon this question, unless our interpretation of the following language of the late Justice Lamar, is incorrect:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNeil v. Holbrook,* 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, *by the statute giving the cause of action,* the lapse of time not only bars the remedy but destroys the liability. *Phillips v. Grand Trunk Ry.,* 236 U. S., 662; *Boyd v. Clark,* 8 Fed. 849; *Hollowell v. Horwick,* 14 Mass., 188; *Cooper v. Lyons,* 77 Tenn., 597 (2); *Newcomb v. Steamboat Co.,* 3 Iowa, 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which

gave a longer period within which to sue." (Italics added.)

Central Vt. Ry. Co. v. White's Admx., 238 U. S., 507.

Seaboard Air Line Railway v. Koenneke, 36 S. C. Rep., 126.

The language of section 9, which was added by way of amendment by Congress April 5, 1910, shows beyond question that the Federal Employers' Liability Act gives the employee a right of action which did not exist prior to the enactment of this statute. It is provided by section 9: "That *any right given by this act* to a person suffering injury shall survive to his or her personal representative, etc."

The act deals with liability of carriers while engaged in commerce between the states for any injury resulting in whole or in part from the negligence of any of the employees of such carrier or by reason of any defect in its machinery, track, roadbed, or works.

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

Under the authority of *Toledo, St. L. & W. R. Co. v. Slavin* 236 U. S., 454, if the complaint contains allegations of liability under the state statute, and, the proof establishes facts making applicable the Federal Law, judgment for the plaintiff cannot be sustained without proper amendment of the complaint. This is true because the complaint states facts constituting one cause of action and the proof establishes a separate cause of action. Otherwise, the verdict would cure the defect.

In the Slavin case it was contended that no advantage could be taken of the Federal Act because the pleadings contained no reference thereto. This contention was not sustained by the Supreme Court of the United States, but it

was held that allegations of liability under the state law may be met and destroyed by proof on the part of the defendant that at the time of the alleged injury plaintiff was employed in interstate commerce.

If the complaint sets forth a cause of action under the state law and the evidence discloses a cause of action under the Federal Statute, it is proper to direct verdict in favor of the defendant.

> Flanders v. Georgia, S. & F. Ry. Co., (Fla.) 67 So. 68.

Where there is no allegation of facts constituting a cause of action under the Federal Act and the proof shows that the employee was employed in interstate commerce, nonsuit is proper.

> Kamboris v. Oregon-Washington R. & Nav. Co. (Or.) 146 Pac. 1097.

> "By its last section a *right of action is conferred* (under conditions specified) for injury or death of the employees, 'resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, track, roadbed, works, boats, wharves, or other equipment.'" (Italics added.)

> Seaboard Air Line Railway v. Horton, 233 U. S., 492.

That the cause of action created by the Federal Act differs from a cause of action under the statute of the State of Pennsylvania is held in *Troxell v. Delaware, L. & W. R. Co.*, 33 Sup. Ct. Rep. 274. In that case it appears that plaintiff had prosecuted to an unsuccessful conclusion an action for damages for the death of a railroad employee based upon the state law. Subsequently suit was brought

under the Federal Law to recover for such death. From judgment for plaintiff, defendant appealed. The Circuit Court of Appeals held that plaintiff's right to recover was *res adjudicata*. The Supreme Court denied the identity of the causes of action and sustained judgment for plaintiff.

After analyzing the two causes of action, Mr. Justice Day says:

> "We think it is apparent from what we have said that the first case was presented and tried upon the theory that it involved a cause of action under the state law of Pennsylvania. It was so submitted to the jury, and they were told that they were not to consider the Federal law, but recovery should be based upon the right under the state act. If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under that law, and pursued the supposed remedy until the court adjudged it never had existed, would not, of itself, preclude the subsequent pursuit of a remedy for relief to which in law she is entitled."

In his work on the Federal Employers' Liability Act, Thornton says:

> "The true rule is that if the declaration or complaint does not disclose the action is based or grounded upon the statute, then the plaintiff is not seeking to recover for an injury received while engaged in interstate traffic of the defendant and the sufficiency of his pleadings must be measured by the general state law, the provisions of the statute not being involved. However, if the evidence discloses the case is one under the statute there will be a fatal variance and the plaintiff must fail."
>
> Thornton's Federal Employers' Liability Act (2d Ed.) Sec. 140.

"When the question arises whether the Federal Act applies, the burden is upon the person asserting it to show that the facts at the time of the happening abated the original and primary sovereignty of the state, and permitted the exceptional and limited power of the Federal Government to attach.."

McAuliffe v. N. Y. C. & H. R. R. Co., 150 N. Y. Supp., 512.

The Plaintiff Had the Selection of the Basis of His Action.

"The plaintiff, and not the defendant, had the selection how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts."

St. Louis I. M. & S. R. Co. v. Hesterly, 228 U. S., 702.

If there had been doubt in plaintiff's mind as to the cause of action upon which he relied for his recovery, alternative allegations could have been inserted in his complaint based upon the State and Federal laws. This course is permissible under our practice, and the United States Supreme Court has said that there is nothing in the Federal Act to prevent it.

Wabash R. Co. v. Hayes, 234 U. S., 86.

Counts at common law and under the Federal Act may be joined.

Bouchard v. Central Vt. R. Co., 87 Vt., 399.
Pelton v. Ill. Cent. R. Co. (Iowa), 150 N. W., 236.
Ex parte Atlantic C. L. R. Co. (Ala.), 67 So., 256.

The Court Had no Power to Allow an Amendment Stating for the First Time a Cause of Action Under the Federal Act After the Expiration of the Period Fixed by the Act for the Commencement of Such Action.

Section 6 of the Federal Employers' Liability Act provides:

> "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

This is not a statute of limitation, but creates a condition precedent to the maintenancce of the cause of action. This section sets a limit to the existence of the cause of action created by the act. At the end of two years from the day it accrues, the cause of action ceases to exist.

> Atlantic Coast Line R. Co. v. Burnett, 36 S. C. Rep., 75.

The same reasoning, which denies to the courts the power to allow an amendment, which states a new cause of action after the operation of the statute of limitations, will apply in the present case.

> Bennett v. R. R., 159 N. C., 345.

> Statutes of limitation are statutes of quiet, and they are beneficient in that they put an end to disputed claims, prevent litigation, quiet titles, and give rest and repose. No matter what may be the criticisms of the casuist, in the law these statutes are no longer regarded as harsh, but furnish a defense, as meritorious as any other."

> Nelson v. Bank, 139 Ala., 578, 586.

In holding that "A common-law action for a personal injury resulting in death cannot be amended so as to count upon the right given by statute to recover for the benefit of

the widow and next of kin, the damages resulting to them from the death," the Supreme Court of Maine in *Anderson v. Wetter,* 69 Vt., 105, says:

"The effect of this legislation is apparent. It was not to create a new remedy for an existing cause of action; but to create the cause of action itself where none existed before. It was therefore necessarily a new cause of acion—a new action. The two causes are inherently distinct, both in their nature and in their results. . . . . It is doubtless true that greater liberality than formerly is allowed in the matter of amendments, and that mere technicalities are not viewed with favor. But it is also true that well-established principles and precedents are not to be lightly set aside. 'It will not be wise to depart too far from the established rules of pleading. Constant departures from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them.' *Lawry v. Lawry,* 88 Me., 482, 34 Atl., 273."

"Amendments are not admissible where the effect would be to prejudice acquired interests, or take away any defense which could be made to an action begun at the time of the amendment."

Henderson v. Graham, 84 N. C., 496.
Martin v. Young, 85 N. C., 157.
Gillam v. Insurance Co., 121 N. C., 369.

"Where by an amendment a new charge is introduced against the defendant, he may make such defenses to it as if it were the foundation of an action then newly begun."

Christmas v. Mitchell, 38 N. C., 535.
Cogdell v. Exum, 69 N. C., 464.
Patterson v. Wadsworth, 94 N. C., 538.
Gillam v. Insurance Co., 121 N. C., 369.

"Where the cause of action is changed by an amended complaint, the defendant has a right to set up in the answer thereto any legal defense, including the statute of limitations, just as if the action had been commenced at the date of the amended complaint."

Sams v. Price, 121 N. C., 392.

"When a suit by a foreign administrator, under Revisal, sec. 59, has been dismissed, and he has subsequently qualified as administrator here, his further proceeding to recover damages for the wrongful act causing the death of his intestate, should be by a separate and independent action; but when he has been permitted by the trial court, without objection, to become a party to the original suit and amend his pleadings to meet the changed conditions in this respect, his action will be deemed as commenced when he was made a party."

Hall v. Railroad, 149 N. C., 108.
Bennett v. Railroad, 159 N. C., 345.

In referring to the Federal Employers' Liability Act of 1906, which contained the same provision as Section 6 of the act of 1908, except that the period is one year instead of two, the Supreme Court of the District of Columbia says:

"The act in question creates a liability where none existed, and takes away defenses formerly available. Coupled with the enlargement of the liability of common carriers is the limitation that no action shall be maintained 'unless commenced within one year from the time the cause of action accrued.' The ordinary statute of limitations confers upon the defendant the privilege

of interposing a definite limitation of time as a bar to the enforcement of a liability existing independently of the statute defining the limitation. Such statutes, therefore, are merely limitations of the remedy. Statutes like the present are more. They create a right of action conditioned upon its enforcement within the prescribed period. The legislature having the power to create the right may affix the conditions under which it is to be enforced, and a compliance with those conditions is essential. 'The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right.' It is, therefore, necessary for one seeking to enforce a right under such statute to state a case within it, and time is of the essence of the right."

Morrison v. B. & O. R. Co., 40 App. Cases D. C., 391.

"The doctrine of the relation back of an amendment to the commencement of a suit is a fiction of the law, and should never be applied where it will operate to cut off a substantial right or defense to new matter introduced by an amendment, though the same be connected with the original cause of action."

Nelson v. Bank, 139 Ala., 578.

"The whole doctrine of relation back rests in a fiction of law, adopted to subserve, and not to defeat right and justice. When an amendment introduces a new right

> or new matter, not within the *lis pendens* and the issue between the parties, if, at the time of its introduction, as to such new right or matter the statute of limitations has operated a bar, the defendant may insist upon the benefit of the statute, and to him it is available as if the amendment were a new and independent suit."
>
> Mohr v. Lemle, 69 Ala., 180.

We submit that it does not meet this position to say that the amendment permitted by the Court in the present case was merely the "inserting other allegations material to the case," as authorized by Section 507 of the Revisal of North Carolina of 1905. This provision of the Revisal is nothing more than a legislative declaration of the rule that a defective statement of a good cause of action may be cured by amendment. Under this rule an amendment which would make a fuller statement of the plaintiff's claim at common law or under the North Carolina statute (Revisal, 2646) would be allowable, but, as is said in *Anderson v. Wetter*, 69 Atlantic (Me.), 105, "to insert an inconsistent count and a new and entirely different cause of action is 'a subversion of the rule.'" In fact, section 507 recognized the limitation to the right to amend pleadings for which we are now contending by providing that pleadings may be amended by the Court *"when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved."*

In *Whalen v. Gordon*, 95 Fed. Rep., at page 313, Judge Sanborn says:

> "There are three established tests that are always useful to determine the identity of two causes of action. They are: Will the same evidence support both? Will the same measure of damages govern both? And will a judgment against one bar the other? Causes of action may differ, concerning which some of these questions

may be answered in the affirmative, but it can be safely said that no two causes of action can be indentical concerning which all these questions must be answered in the negative."

"The rule which governs the reciprocal effect of the doctrine of relation and the statute of limitations upon each other in the matter of amendments to petitions—a rule which seems to be universally sustained by the authorities—may be stated in these words: An amendment to a petition which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, not before introduced or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed."

Whalen v. Gordon, *supra.*

"To determine whether amendment asserts new matter or claim and relates back to the commencement of the suit, so as to cut off the plea of the statute of limitations the true criterion is, whether the matter pleaded amounts to a departure in after pleading as recognized at common law."

Nelson v. Bank, 139 Ala., 578.

"If the matter introduced in a complaint by way of an amendment introduces a new claim or a new cause of action requiring a different character of evidence for

its support, and affording a different defense from that to the cause as originally presented, such amendment will not relate back to the commencement of the suit, so as to prevent the bar of the statute of limitations as to the new matter thus introduced, although the matter introduced might have been joined in a different count in the original complaint."

Nelson v. Bank, *supra.*

In *Union Pac. R. Co. v. Wyler,* 158 U. S., 293, it is held that an amendment to a complaint, setting forth a cause of action under the general law of master and servant, which proposed to declare under a state statute regulating such action constituted a departure in pleading and set up a new cause of action, and that such amendment would not be permitted after the statute of limitations had run.

The Wyler case has repeatedly been cited with approval by the United States Supreme Court, and there has been no suggestion that the march of progress in judicial procedure has changed the principles of justice in pleading so exhaustively stated in the opinion of Chief Justice White.

Atlantic & Pac. R. Co. v. Laird, 164 U. S., 396.
United States v. Dalcour, 203 U. S., 408, 423.
Missouri K. & T. R. Co. v. Wulf, 226 U. S., 570.
St. L. I. M. & S. R. Co. v. Hesterly.

In the Dalcour case the Court says: "In the present case the change is a change in the allegations of fact, and was most material, because it necessarily was followed by a direct facing about with regard to the law. We shall not dispose of the case on this ground, but we think it proper to say that the difficulties in the way of upholding this amendment under the last mentioned decision (*Union Pac. R. Co. v. Wyler,* 158 U. S., 285), have not been removed from our minds."

In *Atlantic & Pacific R. Co. v. Laird,* 164 U. S., 396, Chief Justice White says:

> "The question to be determined, therefore, is whether the trial court erred in holding that the amendments effected by the second amended complaint did not set up a new cause of action; for, if the second amended complaint stated a distinct and independent cause of action, the bar of the statute should have been allowed to prevail. *Union Pacific R. Co. v. Wyler,* 158 U. S., 285."

We are aware of that line of cases of which the Cox case (145 U. S., 593) is an example, which hold that it is permissible to add by way of amendment allegations of facts which merely amplify the cause of action alleged, and that as to such amendments the bar of the statute is not applicable if the action was originally brought within the period of limitation.

There is a clear distinction in the Cox case and the present case. Certainly the distinguishing character of that case, when compared with the Wyler case (158 U. S., 285), upon which we rely and the controlling force of the Wyler case are made plain by the following language of Circuit Court Judge Sanborn in *Whalen v. Gordon,* 95 Federal, at page 305 *et seq.*

> "The rule is well illustrated in two of the cases from the Supreme Court cited above. In *Railroad v. Cox,* 145 U. S., 593, 12 Sup. Ct., 905, the original petition was for damages for negligence 'by reason of the defective condition of the cross ties and roadbed,' and the amendment for damages for negligence 'by reason of the drawhead and coupling pin not being suitable for the purpose for which they were to be used, and he being ignorant thereof, and of the defective condition of the track.' The Court held that the amendment only

amplified the statement of the negligence of the railroad company relative to the defective condition of the great machine it was operating which was made in the original petition, and that it did not state a new or different cause of action. In the last case in which the Supreme Court had occasion to consider this question (*Railway Co. v. Wyler*, 158 U. S., 293, 15 Sup. Ct., 877), the original petition was for negligence of the railway company in employing and retaining a fellow servant who was known to be incompetent, by means of whose incompetence and negligence a heavy iron dump was permitted to fall upon the plaintiff. The amendment counted upon the negligence of the same fellow servant and the statute of Kansas, which charges a railroad corporation with negligence of the fellow servants of the injured employee. The original petition counted upon a liability of the railroad company under the common law; the amendment, upon a liability under the statute of Kansas. Both causes of action were based on the same transaction and resulted from the same facts. The Supreme Court held that the amendment stated a new cause of action, and that it was barred by the statute of limitations. The opinion of the Supreme Court in this case seems to meet and dispose of the contention that since Iowa and the other states which have adopted the code system of pleading and practice have abolished all forms of action, and require the petition to contain 'a statement of the facts constituting the plaintiff's cause of action' only, a different rule should prevail in those states, and any cause of action arising out of the same transaction pleaded in the original petition should be permitted to be ingrafted by an amendment upon it, and allowed to relate back to the commencement of the action, although it had not been stated and no claim upon it had been made in the original pleading. We must not forget that, while forms of

actions are abolished in these states, the essential natures and causes of action are not abolished. An action for a money judgment upon a promissory note, and an action to foreclose a mortgage made to secure it, may be stated under the Code in the same form, and may arise out of the same transaction, but they differ widely in their grounds, their characteristics, and their results. The forms of actions of ejectment, trespass, and assault and battery may have disappeared, but the causes and characteristics of these actions still remain. Let a stranger wrongfully enter upon a homestead of an owner, break down the door of his house, forcibly eject him from his premises, and wrongfully retain them from him. That transaction gives rise to at least three causes of action, which, under the statutes of Iowa, have different periods of limitation; one for injuries to the person, with a limitation of two years; one for injury to the property, with a limitation of five years; and one for recovery of real estate, with a limitation of ten years. Ought the rule to prevail in the Code states that the owner of this property may set out the facts of this transaction, and demand a recovery of his real property only, keep his action upon this cause pending for nine years, and until the statute has run on his cause of action for injury to the person and to the property, and then revive them by ingrafting them upon his petition in ejectment by amendment in defiance of the statute of limitation, because they arose out of the same transaction as his cause of action to recover the land? It is as vital to the interests of society in the states which have adopted the code system of pleading as it is in the other states that these statutes of repose shall not be evaded or annulled, and this result can only be avoided by the application to the effect of amendments to pleadings of the general rule we have announced. It seems to us to have been adopted in all the states of the Union, and we

think it should be steadily and uniformly maintained and applied in the Federal courts.

This is evidently the view of this question which has been taken by the Supreme Court of the State of Iowa. In *Van De Haar v. Van Damseler,* 56 Iowa, 671, 676, 10 N. W. 227, the plaintiff brought an action for seduction. After the statute had run against the cause of action for rape she amended her complaint, and pleaded a cause of action for rape. Both causes of action arose out of the same transaction, and in each pleading she stated the facts constituting her cause of action according to the Code. The only difference in the two statements was that in one she conceded, and in the other she denied, her consent. Although these causes of action arose out of the same transaction, the Supreme Court of Iowa held that the cause stated in the amendment was different from that stated in the original petition, that the amendment did not relate back to the commencement of the action, and that the second cause of action was barred by the statute. An extended review of the authorities seems unneccessary, because this court is bound by the decision of the Supreme Court of the United States, and its opinion in Railway Co. v. Wyler appears to us to end debate. In that case the cause of action in the original petition arose out of the same transaction as did that stated in the amendment—out of the fact that a fellow servant negligently allowed a heavy iron dump to fall upon the plaintiff. The action was brought in a code state, where forms of action were abolished. The only difference in the statement of the two causes of action was that in the one the plaintiff counted on the known incompetency of the fellow servant through whose carelesseness he was injured and the common law, and in the other on the negligence of the same fellow servant and the Statute of Kansas, which charges railroad companies with the negligence of such servants.

> The case was tried in the United States Circuit Court, which necessarily took judicial notice of the common law and of the Statute of Kansas. The truth is that both causes of action not only arose out of the same transaction, but under the same laws, and out of the same facts. The only real difference was that in the one the plaintiff claimed to recover under the common law, and in the other under the Statute of Kansas. But the Supreme Court held that this was a departure from law to law, and that the cause of action stated in the amendment was a new cause of action, and was barred by the statute."

There is another line of cases, illustrated by *Missouri K. & T. R. Co. v. Wulf,* 226 U. S., 570, in which it is held that an amendment in matter of form and not of substance may be permitted after the period of limitation fixed by the statute creating the cause of action has expired. That the decision of the Wulf case did not in any way lessen the force of the Wyler case in its application to the facts of our case appears from the opinion of Mr. Justice Pitney, and is further strengthened by reference to the authorities cited therein with approval.

The Cox and Laird cases have been discussed. The other cases cited by Mr. Justice Pitney are:

Stewart v. Baltimore & Ohio R. Co., 168 U. S., 445:

Action was brought in the District of Columbia for damages for wrongful death based upon the statute of Maryland. The Court of Appeals was of opinion that the action could not be maintained under the Statute of the District of Columbia because that authorizes recovery only in case the injury causing death is done within the limits of the District, and under the Maryland Statute because of the peculiar form of remedy prescribed therein. The Supreme Court held that while, under the Maryland Statute, the state is the proper plaintiff and the jury trying the case is to apportion

the damages received, and, under the Act of Congress in force in the District of Columbia, the personal representative of the deceased is the proper plaintiff and the damages recovered are distributed by law, these differences were not sufficient to render the Statute of Maryland inconsistent with the Act of Congress or the further holding of the District of Columbia.

Patillo v. Allen-West Commission Co., 131 Fed. 680:

"An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the state, a plaintiff is only required to state the facts which constitute his cause of action." (Headnote by the court, consisting of Sanborn, Van Devanter and Hook, Circuit Judges.)

McDonald v. Nebraska, 101 Fed., 171:

Action was originally brought in the name of the state treasurer against the receiver of an insolvent bank, to recover certain moneys belonging to the state on deposit in the bank. A demurrer was filed, based upon the incapacity of the treasurer to maintain suit, because the state appeared from the complaint to be the sole party in interest. The demurrer was sustained but, on motion, the court permitted the State of Nebraska to be substituted as the sole plaintiff.

The defendant entered the objection that the substitution to he state as plaintiff was a change of the cause of action and that as the statute of limitations had run against the plaintiff's claim before the substitution was made, the cause was barred. The Circuit Court of Appeals, Eighth Circuit, in an opinion by Circuit Judge Caldwell, decided against this position upon the ground that, where either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. In this case the action was for the same cause from beginning to end, and presented no question of the right to introduce a new cause of action after the expiration of the period of limitation.

Reardon v. Copper Co., 193 Fed., 189:

In this case the case of McDonald v. Nebraska is reviewed and followed in holding that it is proper to allow a complaint in an action brought by the father to recover damages for the death of his son to be amended by substituting the administrator as plaintiff in the action in place of the father, although the amendment is offered after the expiration of the period in which an action for death by wrongful act could be brought. After reviewing the McDonald case and several other cases to the same effect, District Judge Van Fleet says:

> "The principles announced in these cases are clearly applicable to the circumstances presented here. As we have seen, *no change has been worked in the form or substance of the cause of action set up. That remains in all respects the same.* The father is now, as he was when the original complaint was filed, the real party in interest, for whose benefit, under the express langu-

age of the statute, the action may be maintained. He has then a right to have the action prosecuted, but the law says that that must be done through the instrumentality of the legal representative rather than that of the immediate beneficiary; and *this purely formal requirement* is all that is accomplished by the amendment allowed." (Italics added.)

In the case of *St. Louis I. M. & S. R. Co. v. Hesterly*, 228 U. S., 702., the United States Supreme Court makes it plain in the following language that the Wyler case was not overruled by the Wulf case:

> "The plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts. Whether the defendant could have defeated the first count also on the ground that the plaintiff was suing upon a statute of one jurisdiction, whereas the action could be maintained only on that of another, need not be decided, since the defendant asks reversal of only so much of the judgment as rests on the second count. Hence it is unnecessary to consider whether the principle of *Union P. R. C.o v. Wyler*, 158 U. S., 285, or that of *Missouri K. & T. R. Co. v. Wulf*, 226 U. S., 570, 577, should be applied. See further, *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S., 434, 442; *Northern P. R. Co. v. Slaght*, 205 U. S., 122, 131; *United States v. Dalcour*, 203 U. S., 408, 423."

The Wulf case seems to us to be quite clearly distinguishable from the present case. In that case it was alleged in the original complaint that the deceased, at the time of his death, was in the employ of the defendant as a locomotive fireman, and in the performance of his duties as such upon a train bound from Parsons, in the State of Kansas, to Osage, in

the State of Oklahoma." The action was originally commenced by Sallie C. Wulf in her individual capacity. The amendment, tendered more than two years after the cause of action accrued, asked that the plaintiff be allowed to recover as administratrix. In holding that this amendment did not set up a new cause of action, and, therefore, related back to the commencement of the action, the court says:

> "It seems to us, however, that aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce." Again, the court says: "This change was in form rather than in substance."

And in distinguishing the Wyler case, it is said:

> "Since, in the present case, the Federal Statute did not need to be pleaded, and the amended petition set up no new facts as the ground of action, the decision in the Wyler case is not controlling."

Here is stated in brief the controlling distinction in the Wulf case and our case. The original complaint filed by Renn makes no reference to the Federal Statute and contains no allegation that at the time of his injury he was employed in interstate commerce. The amendment contains the *new facts* that he was employed in remedying a defect in an instrumentality used in interstate commerce and was about to board a train being operated between the States of Virginia and North Carolina. The allegations of the *new facts* made applicable a *new law*. There is departure from fact to fact and from law to law, thus violating in each detail the principles established by the Wyler case.

The Amendment Allowed by the Court States a New Cause of Action, Which is Barred by the Expiration of the Period of Limitation Fixed by the Act Creating the Right of Action.

Roberts, in his work on Injuries to Interstate Employees, (1915), Sections 162-163, says:

> "Where a mother, the sole heir and dependent of a deceased employee, a single man, sued in her individual capacity and in her first and original petition, sufficiently averred that his death was caused by injuries while the carrier was engaged and he was employed in interstate commerce, but also in her petition referred to and asserted a right to sue under the laws of Kansas, an amendment of the petition after the two-year period of limitation, permitting her to sue as administratrix as required by the Federal Act, was properly allowed. (*Missouri K. & T. R. Co. v. Wulf*, 226 U. S., 570.) In the Wulf case the decedent was a locomotive fireman on a train bound from Kansas into Oklahoma and these facts, constituting employment in interstate commerce, appeared in the original petition. Notwithstanding the fact that the plaintiff erroneously, under the facts stated in her petition, asserted her right to recover under the state laws, yet the court, when the facts stated in her petition showed liability exclusively under the Federal Act, would take judicial notice that the state law mentioned in the petition was superseded by the Federal Act and that the cause of action was not changed any more than if the plaintiff had referred to any other repealed statute. Aside from the capacity in which she sued, there was no substantial difference between the original and the amended petition, the same state of facts as to interstate commerce being alleged in both. The change was in form rather than in substance nor did the amended petition set up any

different state of facts as the ground of action, and therefore, the amended petition realted back to the beginning of the suit. This case has been sometimes cited as authority for the proposition that a petition setting up no facts, showing the engagement of the carrier and the employment by it of the servant in interstate commerce at the time of the injury, may be amended even after the two-year period of limitation provided by the Federal Act, so as to show a cause of action, under the national statute. The decision, however, does not go to that length because the court found that the original petition sufficiently averred facts showing employment in interstate commerce, the sole change being the capacity in which the plaintiff sued. The mere fact that the plaintiff referred to the Kansas Statute in her petition as authorizing the recovery, the court treated as nugatory in view of the other facts showing liability under the national act. A former case (*Union P. R. Co. v. Wyler,* 158 U. S., 285), in which the plaintiff sued under the common law and sought after the limitation period to amend by basing his cause of action on the Statute of Kansas, was distinguished, in that the ground of recovery was changed, and the court, the suit being tried on removal in Federal Court in Missouri, would not take judicial notice of a Kansas Statute.

"But where an action for wrongful death was brought by deceased's widow as such, under a statute giving her alone the right of action, for her sole benefit, an amendment to the declaration, changing the relation in which she sues from that of widow to that of administratrix, for the benefit of herself as widow and her children, and changing her cause of action to one under the Federal Employers' Liability Act, while permissible, yet, if made after the limitation period under the latter statute, does not relate back to the time of the commencement of the original action so as to avoid the bar

of the statute of limitation, being in effect the bringing of a new action under the Federal Statute. ((*Hall v. L. & N. R. Co.,* 157 Fed., 464; 174 Fed., 1071.) The Hall case cited is quite different from the Wulf case for here the widow was the sole party in the original petition; the widow and children were asserting rights in the amended petition. Neither did the original petition states facts showing liability under the national act. In another case (*Allen v. Tuscarora Valley R. Co.,* 229 Pa., 97), a brakeman brought an action against a railroad company which stated a cause of action against the common law. The injury occurred on February 29, 1904. Suit was brought on July 1, 1904. On January 21, 1909, the plaintiff asked leave to file an amended petition setting up a cause of action under the Federal Safety Appliance Act and specifically under the section as to automatic couplers. Defendant objected to the allowance of the amendment upon the ground that it introduced a new cause of action which was barred by the statute of limitation. The court sustained this assignment and held that the amended answer set up a new cause of action and was improperly allowed by the trial court if barred by the statute of limitation. The court, in passing upon the propriety of the amendment, said: "But, it will be observed, in the amendment there was a departure, not one from the facts as allowed in the original statement, but also from the law as applicable to the fact in the original statement. In other words, there was a departure, not one from fact to fact, but from law to law. . . . The original statement, it is true, averred the injuries of the plaintiff and the alleged negligence of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce or that the defendant's cars were equipped with couplers in violation of the

> Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the decisions in determining whether the amendment introduced a different cause of action. It is apparent that without this amendment the Act of Congress could have had no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks of dangers of his employment."

In *Allen v. Tuscarora R. Co.,* 229 Pa., 97, cited in the foregoing text, it is held that the complaint in an action by a railroad employee for injuries caused by failure of the company to use cars equipped with couplers in ordinary use cannot, after the limitation period has elapsed, be amended so as to charge filure to comply with the Act of Congress requiring railroads to equip their cars with automatic couplers.

In so holding, the Supreme Court of Pennsylvania says:

> "The Act of Congress is the basis of the plaintiff's claim, as laid in the amended statement, while, in the original statement, the basis of the claim is the failure of the carrier to perform its common-law duty to him as its employee. The amendment is not a restatement, or the statement in a different form of the same cause of action, but the averment of a statutory cause of action in which the liability is different and greater than in an action at common law. It deprives the defendant of a valuable right, viz., the defense of the assumption of risk by the plaintiff, which is not permissible. *Kaul v. Lawrence,* 73 Pa., 410. We think it clear that the amendment to the statement of claim introduced a new and different cause of action, which was barred by the statute of limitations, and therefore, under the well-settled rule in this state, it should not have been allowed.

"In support of the contention that the amendment did not change the cause of action, the learned counsel for the plaintiff claims that the language of the original statement was not changed in any way by the amendment, which, it is alleged, consisted simply of an addition to the original statement, and directed attention to the Act of Congress, and its supplement, as being applicable to the facts of the case. But, it will be observed, in the amendment there was a departure, not only from the facts as laid in the original statement, but also from the law as applicable to the facts in the original statement. In other words, there was a departure, not only from fact to fact, but from law to law. A departure in pleading may either be in the substance of the action or defense, or the law on which it is founded. 2 Saunders, Pl. & Ev. 807. The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce, or that the defendant's cars were equipped with couplers in violation of the Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. *Wabash R. Co. v. Bhymer,* 214 Ill., 579, 73 N. E., 879. It is apparent that, without this amendment, the Act of Congress could have no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks of dangers of his employment. If, however, all the facts necessary to bring the case within the Act of Congress had been included in the original statement, it would have been insufficient as a statement under the act without a reference to the statute. *Bolton v. Georgia P. R. Co.,* 83 Ga., 659, 10

S. E. It is also true that if, as claimed by the plaintiff,all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be change or departure from the original statement, not from fact to fact, but from law to law—from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action. *Union P. R. Co. v. Wyler,* 158 U. S., 285, 39 L. Ed. 983, 15 Sup. Ct. Rep. 877; *Boston & M. R. Co. v. Hurd,* 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 116."

The same result was reached in the following cases:

Moliter v. Wabash R. Co. (Mo), 168 S. W., 250.
Hughes v. N. Y., O. & W. R. Co., 143 N. Y. Supp. 603.
Finley v. Coal & Coke Ry. (W. Va.), 87 S. E., 198.

State Courts Accept the Wyler Case as Controlling and Refuse to Permit Amendments Stating a Cause of Action Under the Federal Act After the Expiration of Two Years.

This question was presented to the Missouri Court of Appeals in *Moliter v. Wabash R. Co.,* 168 S. W., 250, and in an opinion by the Presiding Judge, every authority relied upon by the plaintiff in our case is analyzed and shown to be inapplicable. It was admitted in that case that plaintiff was employed in interstate commerce by a railroad engaged in such commerce. It was also conceded that plaintiff's petition did not state a case under the Federal Employers' Liability

Act. It was insisted, however, that the evidence in plaintiff's behalf showed a case under the statute, and that thereupon that statute became applicable and excluded and superseded all laws which would otherwise have been applicable. Upon familiar authority, the Court agreed that the plaintiff's cause of action arose exclusively under the Federal statute. But the Court denied the plaintiff's right to recover under the Federal statute upon a petition which failed to allege a cause of action thereunder. On this point the Court said:

> "Plaintiff's action, as stated in his pleading, being either under the common law or the statute of Missouri, and not under the Federal statute, he cannot recover under the latter statute without changing his cause of action from law to law; and that we decided in *McAdow v. K. C. Western Ry. Co., supra,* he could not do so. See also *Union Pacific Ry. Co. v. Wyler,* 158 U. S., 285, 15 Sup. Ct., 877, 39 L. Ed., 983; *St. L. & San Fran. Ry. v. Seale,* 229 U. S., 156, 33 Sup. Ct., 651, 57 L. Ed., 1129.
>
> Plaintiff's insistence is that, if the evidence showed his right of action was under the Federal statute, he could recover, although no facts constituting such action were pleaded, and although he did no submit the case to the jury under that statute. That idea is no less than a claim that a pleading does not bind the pleader, and indeed is unnecessary, since a recovery may be had for the violation of any right which the evidence may disclose. The authorities cited by plaintiff in no way support his position. His citation from Thornton's Federal Employers' Liability Act, Sec. 140, is the reverse of it. That author says that if, as here, the petition does not disclose that the action is based on the Federal statute, then the plaintiff is not seeking to recover on that statute, 'and the sufficiency of his pleading must be measured by the general statute law; the provisions of the

(Federal) statute not being involved.' The author adds that:

'However, if the evidence discloses the case is under the statute, there will be a fatal variance and the plaintiff must fail.'

He also cites us to *Mo., Kan. & Tex. Ry. Co. v. Wulf*, 226 U. S., 570, 33 Sup. Ct., 135, 57 L. Ed., 355. The case has no application. In that case the original petition alleged facts which constituted a good cause of action under the Employers' Liability Act, though it was averred therein that the action was brought on the statute of Kansas. An amended petition was filed in which was again averred facts which constituted a good cause of action under the Federal statute, but wherein it was alleged that the plaintiff had a cause of action by virtue of both the Kansas and the Federal statute. The railway company insisted that the amended petition set up a new and distinct cause of action. Of this the Court said:

'It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce. . . . It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the Court was presumed to be cognizant of the enactment of the Employers' Liability Act and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases, 223 U. S., 1, 53 (32 Sup. Ct., 169, 56 L. Ed., 327, 38

L. R. A. (N. S.), 441. Therefore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.'

It will be seen from this quotation that, first and last, a cause of action was stated on the Federal statute, while in the case at bar the petition fails altogether to state a cause under that statute."

In the Moliter case, plaintiff's counsel attempted to cure by amendment, after verdict, the failure to allege a cause of action under the Federal statute, but the Court denied this right by saying:

"But it is said that, conceding the error herein pointed out, judgment should nevertheless be affirmed and the cause remanded to the end that the petition be amended to conform to the proof. We think there is no authority for such course. The defect in plaintiff's case is not a mere variance; it is a total failure to prove the cause of action alleged. 'In short, the case pleaded was not proved, and the case proved was not pleaded.' *St. L. & San. Fran. Ry. Co. v. Seale,* 229 U. S., 161. This is made manifest by the suggestion that, under plaintiff's petition, contributory negligence does not affect the measure of his damages and only goes to defeat the action, while under the Federal statute it does not defeat the action, but does affect the measure of damage."

And in the final effort to shift from the state law to the Federal law, plaintiff asked that the cause be remanded to afford an opportunity to amend his complaint. This final appeal was denied because the amendment would introduce a separate and distinct cause of action from that alleged in the original petition. Judge Ellison says:

"It is next insisted that the judgment should not be reversed outright, but the cause should be remanded, that plaintiff might file an amended petition setting up a cause of action on the Federal statute, and go to trial on the amended pleading. In our opinion the law in this state does not give plaintiff that right. *Hansberger v. Pac. R. R. Co.,* 43 Mo., 196; *Scovill v. Glasner,* 79 Mo., 449; *Cytron v. Transit Co.,* 205 Mo., 699, 104 S. W., 109; *Walker v. R. R.,* 193 Mo., 453, 92 S. W,. 83; *Clothing Co. v. R. R.,* 71 Mo. App., 241; *Stewart v. Vanhorne,* 91 Mo. App., 647. The proof required in a case under the Federal statute is not merely different in quantity, but it is different in character. Under that statute, the evidence must show that the train was in use in interstate commerce, and that the plaintiff was engaged in service in such commerce, while in an ordinary action that character of evidence would be irrelevant. In an ordinary action in this state, whether statutory or at common law, as stated above, a defense exists which is not allowed in an action under the Federal statute; that is, in the ordinary action contributory negligence may be shown in total bar of the action, while in an action on the Federal statute such negligence is only in reduction of damages. So, if plaintiff should die before trial, the action would survive to different beneficiaries. In the ordinary action, to the husband or wife; and, if there be no husband or wife, then to the minor children; and, if there be none, then to the father and mother, or the survivor; then, if there be none, the action may be maintained by the administrator for the estate. While, under the Federal statute, the action is for the benefit of the widow, children, parents, proportionately, a limitation not recognized by our state statute.

N. S. R. R. Co. v. Zachary, 232 U. S., 248, 34 Sup. Ct., 305, St. L. & San Fran. Ry. Co. v. Seale, 229 U. S., 156, 158, 162; 33 Sup. Ct., 651; 57 L. Ed., 1129."

The case of *Hughes v. N. Y. O. & W. R. Co.*, 143 N. Y. Supp., 603, is directly in point. Summons was served January 13, 1911. Complaint was filed March 29, 1911, alleging that the plaintiff was injured April 21, 1910; that the defendant was operating a railroad in the State of New York and in the State of Pennsylvania, and at the places specified, and that at the date of the accident plaintiff "was in the employ of the defendant as a conductor upon a train which was being run by defendant along the line of its railroad near Starlight, in the State of Pennsylvania. The cause of the accident and the statute of the State of Pennsylvania were pleaded. Plaintiff died February 12, 1912, before the action was tried. On October 29, 1913, plaintiff's widow qualified as administratrix and motion was made in February, 1914, to substitute the administratrix as plaintiff and permit her to serve amended complaint, basing the action upon the Federal Act. This was denied by the trial court, and on appeal the Supreme Court affirmed the order in the following language:

> "The action was not brought under that act, but is specifically based on the common law as modified by the statute of the state. An action under the Federal law must be begun within two years from the time the cause of action accrued (section 6), but after nearly three years it is sought to convert the action under the state law into an action under the Federal law, thus extending the statute by a substituted cause of action. On April 5, 1910, the Federal Act was amended so as to provide 'that any right of action given by this act to a person suffering injury shall survive,' etc. But the right cannot survive the time limited for its exercise, and when the person to whom the right is initially given elects to proceed under the law of the state, the right to proceed under the Federal Statute is at least dormant and ceases after the expiration of two years. The Federal statute

is tendered to him who, entitled, choses to employ it. He may prefer the law of the state, as the injured person did in the present instance. But such law cannot be exploited and, upon emergency, the action be changed into one under the Federal law. There is not a suggestion of fact in the original complaint indicating intention to avail of the Federal statute."

To the same effect is *Morrison v. B. & O. R. Co.,* 40 App. Cas. D. C., 391, 396, in which the court says:

"The original complaint herein invoked the rule of the common law as a ground of action. The attempt of the plaintiff, more than one year after the alleged bad faith of the defendant, to invoke a different rule, namely, the rule prescribed by said act of 1906, must be held to amount to the commencement of a new action. The change was one of substance, and not merely of form. *Union P. R. Co. v. Wylre,* 158 U. S., 285. It is unnecessary, therefore, to determine the effect of an excuse, seasonably pleaded, for failure to bring the suit within the statutory period."

In *Finley v. Coal and Coke Ry. Co.,* 87 S. E. 198 (decided December 17, 1915) the Supreme Court of Appeals of West Virginia, holds:

"An amendment to a declaration by a personal representative, under the state statute giving a right of action for damages for the death of an employee occasioned by the wrongful or negligent act of the employer, setting forth a right of action under the Federal Employers' Liability Act states a new cause of action and will not be permitted."

Justice Poffenbarger, writing the opinion of the court, says:

"Two wholly unconnected statutes imposing duties of different natures can no more constitute the basis of

a single right of action than two unrelated contracts. The contracts come in by pleading, and the statute by judicial cognizance. This merely formal difference cannot vary the principle applicable to substantive rights."

Following this quotation, the Wyler and Wulf cases are discussed and the latter is distinguished and the former held to be controlling.

In *Hall v. L. & N. R. Co.,* 157 Federal 464, it is held that where a widow of an employee of an interstate railroad company brought suit against such company, in a state court of Florida in her capacity as widow, to recover for the death of her husband, such action was necessarily based upon the state statute, and an amendment of her declaration changing the character in which she sued and the beneficiaries of the action introduced a new and different cause of action under the Federal Statute and was, in effect, the bringing of a new action thereunder, which was begun, for the purpose of limitation when the amendment was filed and did not relate back to the time of the commencement of the original action. District Judge Hundley says: "The question of 'relation back' of amendments is a fiction of the law, and shall never be allowed, when to do so would, to the prejudice of a litigant, deprive him of a substantial legal right."

This case at first impression appears to be in conflict with the Wulf case, but an examination of that case will show that the plaintiff was *sole beneficiary* under the Federal and state statutes, and no question of the effect of an amendment changing the beneficiary was involved.

In *Creteau v. Chicago & N. W. Ry. Co.,* 113 Minn., 418, suit was brought under the state statute, and at the conclusion of the evidence, was submitted to the jury under the Federal Law. It was held that this was a clear departure, and judgment for plaintiff was reversed.

Points of Difference in an Action Based Upon the Common Law and the Statute of North Carolina and an Action Based Upon the Federal Employers' Liability Act.

The measure of responsibility fixed by the two acts is different.

The liability of a railroad company to an injured servant, in the State of North Carolina, is fixed by Revisal of 1905, Sertion 2646, as follows:

> "Any servant or employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his service or employment with such company by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void."

In *Seaboard Air Line Railway v. Horton,* 233 U. S., 492, the Supreme Court treats this statute as establishing a different measure of responsibility from that created by the provisions of the Federal Employers' Liability Act. By the first section of the Federal Act, a right of action is conferred for injury "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equpiment." (Italics added.)

The effect of contributory negligence is different.

Under the state law, contributory negligence is an absolute bar to a plaintiff's right to recover.

Under the Federal Law, contributory negligence is not a defense, but the damages are diminished in proportion to the amount of negligence attributable to the employee.

> Seaboard Air Line Railway v. Tilgham, 237 U. S., 499.

Under the state law, contrbutory negligence is no defense where the injury is the result of the master's violation of *any* statute enacted for the safety of the employee.

> Montgomery v. R. R., 163 N. C., 597.

Under the Federal Law, contributory negligence cannot be considered in mitigation of damages where the injury results from the violation by the master of a *Federal* statute enacted for the safety of the employee.

> Seaboard Air Line Railway v. Horton, 233 U. S., 492.

The law of assumption of risk is different.

Under the state law, assumption of risk is not a defense in an action brought against a railroad for personal injuries received. Section 2646 of the Revisal of 1905, has been construed to abolish assumption of risk as a defense in all such actions.

> Coley v. R. R., 128 N. C., 534.

Under the Federal Law, assumption of risk is a complete defense unless the employer has violated the provisions of a Federal Statute enacted for the safety of the employee.

> Seaboard Air Line Railway v. Horton, *supra.*

Abatement of action for personal injury.

Under the state law, an action for personal injury abates upon the death of the injured employee.

Bolick v. R. R., 138 N. C., 370.

Under the Federal Law, such action survives, and may be maintained by the personal representative in addition to the action for death resulting from such injuries.

Railroad v. Craft, 237 U. S., 648.

Jurisdiction of State and Federal Courts.

An action under the state law cannot be brought in the Federal Courts unless there is diversity of citizenship.

An action under the Federal law can be brought by the plaintiff in the Federal Courts regardless of diversity of citizenship.

Fulgham v. R. R., 167 Fed., 660.

A suit brought in the state court, based upon the Federal statute, is subject to review by the United States Supreme Court on writ of error; a suit under the state law is not.

Removal.

An action under the state law can be removed to the proper Federal Court where there is diversity of citizenship.

Hyder v. Southern Railway, 167 N. C., 584.

An action under the Federal law cannot be removed to the Federal Court, although the plaintiff and defendant may be citizens of different states and the other jurisdictional grounds may be present.

Kansas City Southern Ry. Co. v. Leslie's Admr., 239 U. S., 559.

An action based upon this act and brought prior to the amendment of April 5, 1910, was removable to the Federal Court regardless of the citizenship of the parties under the

provisions of Section 28 of the Judicial Code. It required the following language of the amendment of April 5, 1910, to prevent such removal: "No case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." This language has been incorporated in Section 28 of the Judicial Code by an amendment effective January 1, 1912. (*The Kansas City Southern Ry. Co. v. Leslie's Admr.*, 238 U. S., 559.) An action of this character at common law or under state statutes has never been removable in the absence of diverse citizenship or local prejudice.

In *Peek v. Boston & M. R. R.*, 223 Fed. 448, motion in the United States District Court to remand to the state court was granted where the complaint stated a cause of action under the state law and the Federal Act, but also showed that at the time of the injury complained of both plaintiff and defendant were engaged in interstate commerce. This was put upon the ground that the Federal Statute controlled the liability and the right of recovery.

Measure of damages is not the same.

The measure of damages is an action based upon the common law or the statute of North Carolina is determined by the courts of North Carolina and the legislature. The court's construction of the common law rule for the measurement of damages is conclusive in the absence of legislative enactment fixing the measure of damages. The decisions of the United States Supreme Court would not be controlling on this question. On the other hand the measure of damages under the Federal Act is determined by the United States Supreme Court in the absence of a declaration by Congress on the subject.

It has recently been held by the United States Supreme Court that an attempt to apply the rule of the state court for the measurement of damages in an action under the Federal Act is error where the rule of the state court conflicts with

the measure of damages fixed by the United States Supreme Court.

Kansas City Southern Ry. v. Leslie's Admr., *supra.*

The fact that by coincidence the decisions of the State Court and the United States Supreme Court should be the same would not make the rules the same, because they are the products of different legislative and judicial systems and constantly subject to change, neither jurisdiction being subject to the control of the other.

Period within which action must be brought differs.

Under the state law, an action for personal injury may be brought within three years (Revisal of 1905, Section 395), and this is strictly a statute of limitation which must be pleaded to be available as a defense.

The two-year limitation provided by Section 6 of the Federal Act supersedes state laws limiting the period within which an action for personal injury or wrongful death may be brought.

Shannon v. Boston & M. R. R. (N. H.), 92 At., 167.

Under the Federal law, the action must be commenced within two years from the date the cause of action accrued, and this is not a mere limitation of the remedy, but is a condition upon which the right is based and the defendant is not required to plead it.

Atlantic Coast Line R. Co. v. Burnett, 36 S. C. Rep., 75.

Parties.

In an action under the state law plaintiff's co-employees can be joined as parties defendant.

Hough v. R. R., 144 N. C., 692.

Under the Federal statute this cannot be done, because no provision is made by that statute, expressly or by implication, for recovery by one employee against his co-employee.

Thompson v. Cincinnati W. O. & T. P. Ry. Co. (Ky.), 176 S. W., 1006.

The pending of an action under the state statute is no defense to an action under the Federal Act.

In *Cory v. Lake Shore & M. S. R. Co.,* 208 Fed., 847, where the complaint stated a cause of action under the Federal Act, the Court, on motion of plaintiff, struck from the answer an allegation that there was an action pending in the same court based upon the state statute upon the ground that the allegation stated no matter of defense.

The Facts Showing the Injury Sustained by Plaintiff do Not of Themselves Constitute a Cause of Action.

This position is fully sustained by the following language from *Union Pac. Ry. v. Wyler, supra:*

> "It is argued, however, that as all the facts necessary to a recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law."

Davis v. Mfg. Co., 106 Ga., 126.
Kansas City v. Hart, 60 Kansas, 684.

In *Box v. Railroad,* 107 Iowa, 660-666, the Supreme Court of Iowa says:

"Appellant says the cause of action is the injury wrongfully inflicted by the defendant through the negligence of the defendant. That means a cause of action based on defendant's negligence, and, if that is the meaning of the term, for the purposes of pleading, then no amendment would be vulnerable to the objection that it stated a separate cause of action, so long as the facts pleaded constituted negligence. No authority that we have seen supports such a rule."

If the Supreme Court of North Carolina has taken the correct view of this matter, then the mere statement of facts showing an injury can be amended interminably, and the expiration of the statutory period could never be a bar to the amended causes of action so long as they were based upon the original facts showing damage. It has often been held that the mere fact that causes of action grow out of the same transaction will not permit their introduction by amendment after the operation of the statute of limitations.

Van de Haar v. Van Domseler, 56 Iowa, 671-676.

The Supreme Court of Alabama has said:

"It may be that in our decisions, when speaking on the subject of amendment, the employment of the expression of *new cause of action* is calculated to produce some confusion or misapprehension. But an analysis of these cases will be sufficient to show that the expression can be taken when so used as intending nothing more than a *new right or claim* arising out of the same transaction. If it were not so, that is to say, if the new cause of action was one arising out of a wholly different transaction from that laid in the complaint, then it would constitute what we have sometimes designated as an *entirely new cause of action,* and one which could not be introduced into the complaint by amendment, if objected to. Identity of transaction is, therefore, the basis for the introduction by way of amendments of

counts on new *claims or rights* arising out of the same transaction. If the matter sought to be introduced by amendment relates to an entirely different transaction from that laid in the complaint, it would be such a radical change as to constitute an entirely different cause of action, not allowable under our very liberal construction of the statute of amendments."

Nelson v. Bank, 139 Ala., 578, 589.

If this complaint contained merely a defective statement of a good cause of action, such defect could be taken advantage of by demurrer. (*Halstead v. Mullen,* 93 N. C., 252.) But demurrer to this complaint could not be sustained, because there is stated a good and complete cause of action at common law and under the statute of North Carolina. If demurrer had been filed, we would have been met with the statement, and properly so, that the privilege of selecting the grounds of his recovery rests with the plaintiff, and that the defendant has no right to assume that the plaintiff has failed to understand his rights and has failed to allege the facts essential to their enforcement. It was when the plaintiff's own evidence established the true condition that defendant was in position to take advantage of the failure of plaintiff's complaint to contain allegations which would be supported by his proof.

St. Louis S. F. & T. R. Co. v. Seale, 229 U. S., 156.

On demurrer the sufficiency of the complaint will be tested by the state law unless the complaint itself shows that the plaintiff was relying upon the Federal Act or that the Federal Act was applicable.

M. K. & T. R. Co. v. Neaves (Tex.), 127 S. W., 1090.

Answer to Argument That Plaintiff Had Only One Cause of Action and, Therefore, Brought Suit on the Cause of Action Based Upon the Federal Act.

The question here presented is not what cause of action plaintiff had at the time suit was brought, but what cause of action did his complaint set up. If all pleadings should be construed to contain a statement of the cause of action which plaintiff could maintain, no amendment would be vulnerable to the objection that it introduced a new cause of action. Plaintiff's answer would be that he had only one cause of action, and in filing his complaint, he intended to rely on that cause of action, notwithstanding he makes no reference to it in his complaint. The question is not what plaintiff might have pleaded, *but what he did plead.*

If the plaintiff had pleaded the state statute, could there be any doubt that he was relying upon its provisions? Then could it be said that he had brought an action *under the Federal Act* within two years? Under well recognized principles of pleading, a complaint setting forth facts which make applicable the provisions of a public law is just as certainly an acti based upon such law as if the law itself were expressly referred to in the pleading.

In *Union Pac. Ry. Co. v. Wyler,* 158 U. S., 285, the fact that Wyler had no cause of action at common law and that his sole right to recover arose under the Kansas statute was not regarded as controlling by the Supreme Court. Wyler said he had a good cause of action at common law, just as Renn said that he had a good cause of action at common law and under the statute of North Carolina. It is too late, we submit, for Renn, as it was held to be for Wyler, to allege facts establishing a different cause of action after such cause of action has ceased to exist.

In *Patillo v. Allen-West Commission Co.,* 131 Fed., 680, it is said that:

> "An amendment, which introduces a new or different cause of action and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction and by the practice of the state, a plaintiff is required only to state the facts which constitute his cause of action."

This is a statement of the general rule. The new or different cause of action referred to does not mean that it must be different from the cause of action which actually exists in favor of the plaintiff, but if it is *different from the cause of action pleaded by plaintiff in the original complaint*, it is obnoxious to the rule. It matters not that plaintiff has pleaded a cause of action which does not exist. He is still precluded from amending the complaint so as to plead the cause of action which actually existed where it differs from the cause of action actually pleaded.

Again, we submit that the complaint states a cause of action under the common law and the state statute or it states no cause of action. It is certain that it does not state a cause of action under the Federal statute. It is attempted by the amendment to make it state a cause of action under the Federal statute after such cause of action has ceased to exist.

Would it have been permissible for plaintiff to have shown by his evidence over defendant's objection that he was employed in interstate commerce without amending his complaint? The evidence would have been excluded, we submit, upon the ground that it was irrelevant to the cause of action pleaded in the complaint, and in order for plaintiff to have overcome the defendant's objection, his complaint would have had to be amended.

Another answer to the plaintiff's argument will appear by

considering that a cause of action at common law and under the state statute did exist if the facts were as plaintiff alleged them, and if defendant had admitted these facts, and set up no others, the action would have been tried to a conclusion under the state law.

Fleming v. R. R., 160 N. C., 196.

While plaintiff from the outset might have had a cause of action under the Federal statute, he did not undertake to assert it until it was brought to his attenion by the defendant more than two years after it accrued.

In *Moliter v. Wabash R. R. Co.*, 168 S. W. 250, the argument that plaintiff had only one cause of action, and therefore brought suit on that cause of action, is met in the following language:

> "Plaintiff's insistence is that, if the evidence showed his right of action was under the Federal statute, he could recover although no facts constituting such action were pleaded, and although he did not submit the case to the jury under that statute. That idea is no less than a claim that a pleading does not bind the pleader, and indeed is unnecessary, since a recovery may be had for the violation of any right which the evidence may disclose. The authorities cited by plaintiff in no way support his position."

The dissenting opinion of Mr. Justice Brown of the Supreme Court of North Carolina in the present case contained an answer to this position of plaintiff which seems to show the fallacy of the argument in support of such position.

There is Not Sufficient Evidence of Negligence in This Case to be Submitted to the Jury.

At the conclusion of the evidence defendant moved for judgment of nonsuit, which, under the North Carolina practice, raises the question of the sufficiency of the

evidence as matter of law to be submitted to the jury (exception No. 17, record, page 86). Defendant also requested the trial court to instruct the jury to answer the first issue, which related to negligence, "No." This instruction was refused, and defendant excepted. (Exception No. 18, record, page 86.)

> "A railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track even in the neighborhood of depot platforms; and a brakeman who is injured in consequence of slipping on it has no remedy against the company."
>
> Piquegno v. R. R., 52 Mich., 40.

As was said in this case, if it was the duty of the defendant to keep snow and ice off the path leading from the tank to the pump, it was its duty to keep it off every path at every point on its right of way. It seems to us to make no difference how the water got on the path, whether through nature or from the overflow of the tank, if the defendant owed the plaintiff no duty to keep the path free from ice, there was no breach of duty in this case.

There is no evidence that the path being used by the plaintiff was marked out by the defendant as the path for its employees. Plaintiff's witnesses said it was the usual path. They also said that employees were free to go any way they desired in getting to the pump, and the evidence shows that there were two additional paths. There is nothing to show that the defendant had ever adopted the path or designated it as the proper one for its employees; there is nothing to show that the defendant marked it out or kept it up. It may have been, and probably was, if a path at all, one of the several ways of getting to the pump. The tank and pump were both in the open country with nothing to prevent pedestrians using any path they saw fit, or walking in any direction they desired. Plaintiff says he was walking in the usual path from the pump to the train. (Record, page 17.) On page 25 of

the record, plaintiff testifies that there was another path that comes up to the side of the tank towards Richmond. That path was on the opposite side of the tank from that on which plaintiff fell.

Parks, plaintiff's witness, explains on page 32 of the record that you can go to the pump house any way you want to go. He also explains the other paths leading to the pump house.

On page 33, this witness says that he looked after things the best he could around the tank. "That was a hard winter. Everything was frozen up. . . . That was the hardest winter I had ever seen around Cochran."

We submit that the defendant owed the plaintiff no duty to prevent its water tank from overflowing and that the evidence is insufficient to show negligence on the part of the defendant.

> "The duty of a master to provide a reasonably safe place in which his servant shall work does not extend to safeguarding the route of every journey the servant may be required to make in fetching and carrying whether messages or portable articles."
>
> Bridge Co. v. Bainum, 146 Fed. Rep., 367.

The defendant had no notice that plaintiff would use that path. If it was dangerous to use, plaintiff had equal opportunity with defendant to know the danger. Plaintiff had his choice of the paths leading to the pump. He was free to go where he pleased. That he selected the path in which the ice had accumulated during the day ought not to be charged against the defendant.

Again, we submit that the evidence does not show that the defendant had notice of the accumulation of the ice. The section foreman says he knew it, but he is not such officer as will charge the company with notice. And it does not appear that the defendant could have cleaned off the path and

kept it clean until after the plaintiff passed over it. The evidence shows that the ice and snow would thaw in the day and freeze again at night.

There was evidence that plaintiff was not in the path when he slipped and fell and defendant was entitled to its eighth request for instruction, quoted at top of page 88 of this brief. (Exception No. 22.)

Plaintiff Assumed the Risk of Injury From Slipping on Ice Around a Water Tank.

This question is raised by the motion for judgment of nonsuit (exception No. 17, record, page 86), and by refusal of the trial court to give defendant's request for instructions that upon all the evidence plaintiff assumed the risk (exception No. 19, record, pages 86-87).

The contention of the defendant on the issue of assumption of risk is that the condition complained of was one of the ordinary risks of an employee engaged in working around water tanks. Any man of ordinary intelligence is charged with knowledge of the fact that in extremely cold weather there is an accumulation of ice around water tanks, and plaintiff admitted that he was well aware of that condition.

Plaintiff testified that, "You find water around the water tanks, but it is on account of the carelessness of the firemen. You find it. I do not know about a plenty of it. I have been to tanks and found water around them, and that is a common thing, but it is not necessary that it should be there but I have seen it there. In cold weather that water freezes like any other water. In weather as cold as this, water that comes down out of the heavens freezes as soon as it hits the ground. I had just gotten to Cochran, had not been there over 30 minutes. I found ice there at that tank. I do not know that I found ice anywhere else that winter." (Record, page 25.)

Railroad employees assume the risks incident to the falling of snow and forming of ice on and the removal of the same

from the tracks and places where employees are required to work, if such removal is made in a proper and reasonable manner.

Labatt on Master and Servant (1st Ed.), p. 604 (note).

A servant is deemed to have notice of all risks which, to a person of his experience are or ought to be open and obvious.

Labatt on Master and Servant (1st Ed.), Sec. 39.

It is presumed that even an inexperienced servant can appreciate the danger of losing his footing on an icy surface.

Labatt on Master and Servant (1st Ed.), page 1098 (note j).

Mr. Labatt says, at page 1045 (1st Ed.):

> "All servants are presumed to be acquainted to some extent with the properties of matter and the operations of the laws to which it is subject. To this generic conception are referable the decisions which proceed upon the hypothesis that a servant is, in some degree at least, bound to take notice of the dangers arising from slippery surfaces, from the action of extreme cold," etc.

Again it is said on page 1044, just preceding the foregoing quotation that:

> "The law supposes every adult to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate any obvious danger. The master, therefore, has a right to assume that an adult possesses 'that knowledge which is acquired by common experience'; that he knows everything which is 'a matter of common knowledge or presumed to be within the common experience of all men of common education;' that

he understands those dangers which are the subject of common knowledge, or can be readily seen by common observation."

Exception No. 1, Record, Page 18.

The plaintiff was permitted to testify over the defendant's objection as follows:

Q. Did you cause your own fall in any way?

A. No, I did not. I was just as careful walking as I could be.

We submit that it was clearly erroneous to permit the plaintiff to testify whether he caused his own fall. This was a question for the jury to determine upon all of the evidence. As direct authority in support of this exception, we refer to *Summerlin v. Railroad,* 133 N. C., 551, in which it was held that it would be error to permit an expert to testify that a certain injury was caused by a fall from a car. We also rely upon *Phifer v. Railroad,* 122 N. C., 940, in which the Court held that it was error to permit the plaintiff to testify that he was careful while at work in building a trestle on the defendant's track. The case of *Raynor v. Railroad,* 129 N. C., 195, is also in point in support of the defendant's objection to this testimony.

It was permissible for the plaintiff to testify fully as to what he did, the conditions surrounding him, and the manner in which he was walking, that is, he could describe all of the circumstances of his fall, and it was the exclusive province of the jury to determine whether the fall was caused by his conduct or by the negligence of the defendant. The cause of an injury is a question for the jury and is not a proper subject for opinion evidence. The harmful effect of this testimony seems to us to be quite manifest. The defendant contended upon the second issue that the plaintiff was guilty of contributory negligence, and that his fall was caused by his walking hurriedly over snow and ice in order to reach a train which was about to leave the station. By the evidence ad-

mitted the plaintiff was permitted to say that what he did did not in any way cause his fall, and that he was just as careful walking as he could be. We submit that this was harmful error for which the defendant is entitled to a new trial.

Jeffreys v. Railroad, 129 N. C., 236.

Exception No. 7, Record, Page 30

The plaintiff's witness, Parks, had been permitted to testify that the water tank was running over during the day on which plaintiff sustained his injuries. He was then asked the question, why was the tank running over. To this question the defendant objected. Objection was overruled and defendant excepted. The Court then asked the witness if he knew why the tank was running over, and he answered, yes, because the pumper was neglecting his duty and let it run after the tank was full. It appears in the record that the defendant asked that this answer be stricken out and the stenographer added as an additional ground for exception the following: "as there is no allegation of such negligence in the complaint." The defendant's request that the evidence be stricken out was general, and as an additional ground it was suggested that there was no allegation of such negligence in the complaint. An examination of the complaint will show that it is nowhere alleged that there was any negligence on the part of the defendant's pumper. In fact, there is no suggestion in the complaint that the pump was in any manner involved in this accident. But aside from this fact, the defendant contends that it was clearly erroneous to permit the plaintiff's witness to say that the tank was running over because *the pumper was neglecting his duty.* It has been uniformly held that it is for the jury to say whether certain conduct constitutes negligence, and that a witness will not be permitted to express an opinion as to whether certain facts establish or do not establish negligence. In *Phifer v. Railroad,* 122 N. C., 940, the plaintiff was per-

mitted to testify that he was *careful* while he was at work in building a trestle on defendant's track, and it was held that this evidence was incompetent. We refer the Court to the opinion in this case as an authority directly in support of Exception No. 7, and we call attention particularly to the language of Mr. Justice Montgomery at page 941.

The Phifer case is cited with approval in *Raynor v. R. R.*, 129 N. C., 195, in which it is held that the Court properly refused to permit a witness to testify whether any more force was used by the officials of the railroad than was necessary in ejecting the plaintiff from the train. The Court says that this was a matter of fact to be determined by the jury, and could not be established by the opinion of the witness, and that to have answered it the witness would have to find the facts constituting the force actually used and draw his conclusion from them.

It will be observed that the witness Parks did not qualify as an expert on the matters relating to pumpers and water tanks, and even if he had so qualified, this would not have cured the error in permitting him to express the opinion that the pumper was neglecting his duty. It is generally held that an expert must not be permitted to usurp the province of the Court and the jury by drawing those conclusions of law or fact upon which the decision of the case depends.

Summerlin v. Railroad, 133 N. C., 551.

In Jones on Evidence (2nd Ed.), Section 372, the author says:

> "Although this view has been earnestly criticised, it is sustained by the undoubted weight of authority, and any lawyer who has had large participation in the actual trial of cases will understand that in many cases trials would become a mere farce if zealous experts were allowed to directly express their opinions upon the very

issue to be tried." In the note that is appended to Sec. 372 of Jones on Evidence (2nd Ed.), will be found numerous cases sustaining the author's views.

The force of this evidence and its effect upon the result of the case will be seen by referring to that part of the Judge's charge covered by defendant's exception No. 28, beginning on page 95 of the record as follows:

> "The plaintiff contends that this accumulation of ice was caused, not by the general weather conditions that prevail, but in a large part, if not entirely, by failure of the pumper to so regulate the pumping of the water as to keep it from running out of the tank, and that by failure to exercise proper care he had caused the tank to overflow and that the water had fallen down around it and had frozen, and that near the tank and around it on all sides of it the ice was three feet deep and extended out into the parth."

The Court then instructed the jury that if the evidence satisfied them of the truth of the plaintiff's contentions as recited by the Court, they would answer the issue of negligence Yes. (Exception 29, Record, page 96.)

Exception No. 24, Record, Page 92.

This exception will be considered together with exceptions Nos. 25, 26 and 27, record, pages 93 and 95, which relate to the same matter.

The Court instructed the jury:

> "The extent of its duty to its employee is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workmen."

Here the Court instructs the jury that the defendant owed the plaintiff the duty to exercise ordinary care to furnish him

a *safe place.* How safe is left to the jury without qualification. The path may have been reasonably safe under the circumstances. If so, the defendant had performed its duty, and there was no liability. Following this instruction the trial judge says: "Now the plaintiff alleges that *that was the duty of the defendant with reference to this path,* and that its failure to perform it constituted negligence." (Italics added.) Then the principle of law announced is applied to the facts of the case as follows:

> "If the evidence satisfies you by its greater weight that the defendant failed in the performance of this duty, and by reason of such failure permitted ice to accumulate upon a path which was the usual path traveled by its employees to and from the pump house to the track, and by reason of such failure, and as a proximate cause thereof, the plaintiff slipped and fell and injured himself, then your answer to this first issue would be 'Yes'; unless you are so satisfied, your answer to it would be 'No.'"
>
> "Now, the plaintiff contends that there was no reason why in the exercise of ordinary care the defendant might not have made that place *safe* for the movement of its employees; that it is in testimony that they cut the ice away in approaching the depot a short distance off, so that people having business with the agent, or passengers taking or leaving the train, could get away from the depot in the open place from which the ice had been cut; that the defendant had present that day a section force which could have been utilized to open this path and cut the ice away; that it had employees there connected with the work train, which had been there for some time during that evening that could have been utilized for the purpose of opening this path and removing the ice, which the plaintiff alleges had accumulated there, and it failed to exercise the care, reasonable

care and prudence which I have told you it was its duty to exercise in order to make a safe place for its employees at that time along that path."

The duty of the master to the servant with respect to the safety of the place to work has been fully considered by our Court in the recent case of *Steele v. Grant,* 166 N. C., at page 641, in which Mr. Justice Walker summarizes the rule as follows:

> "The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, *with a reasonably safe place* and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to tthe servant against injury."
>
> "It is universally held that at this day that it is the master's duty to furnish his servant *reasonably* safe machinery. If he fails to do so he exposes the servant to extraordinary risks and hazards. . . . *The failure to exercise due care* in furnishing such machoinery is a breach of duty which the master owes the servant."
>
> Moore v. R. R., 141 N. C., 111.

In the case of *Gardner v. Railroad,* 150 U. S., at page 359, cited by Mr. Justice Walker in *Steele v. Grant, supra,* the United States Supreme Court says:

> "The master is not to be held as guaranteeing or warranting the absolute safety under all circumstances or the perfection of the machinery or apparatus which may be provided for the use of employees, but he is bound to exercise the care which the exigency reasonably demands in furnishing such as is adequate and suitable, and in keeping and maintaining them i such condition as to be reasonably safe for use."

In the case of *B. & O. Railroad v. Baugh,* 149 U. S., 387, cited in *Steele v. Grant,* Mr. Justice Brewer says:

> "In the case of *Atchison, Topeka, etc., R. R. v. Moore,* 29 Kansas, 632, 644, Mr. Justice Valentine, speaking for the Court, thus succinctly summed up the law in these respects: 'A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to worth with him; and when the master has properly discvharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and employees.' "

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its emplpy."

Railroad v. McDade, 191 U. S., 64.

For a very full discussion of this question see *Powell v. American Sheet & Tin Plate Co.,* 216 Pa., 618.

Exception No. 32, Record, Page 104.

On the measure of damages the Court, over the objection and exception of the defendant, instructed the jury as follows:

> "The plaintiff is entitled to recover as damages, if entitled to recover at all, one compensation for all in-

juries resulting from the defendant's negligent conduct. This damage embraces indemnity for loss of time, inability to perform labor or capacity to earn money, for injuries suffered by body or mind, which are the immediate and necessary consequences of the injury sustained. The plaintiff is to have a reasonable compensation for loss of bodily powers, actual suffering of mind or body, and also from any expense reasonably necessary which you find he may have incurred as a result of the injury sustained, which injury you find is the immediate necessary consequence of the defendant's negligent conduct, if it was negligent, to recover as damages one compensation for all loss which you find by the greater weight of the evidence the plaintiff has sustained in consequence of defendant's negligence. (Exception No. 32. Record, page 104.)

This instruction permits the jury to assess double damages, that is, *for loss of time and inability to perform labor or capacity to earn money.*

Exception No. 33, Record, Page 107.

The trial Court instructed the jury:

"In the nature of things, it is impossible for the law to lay down any definite rule, but it says to the jury that they should award a reasonable compensation, with the emphasis on the word 'reasonable.' He is to be compensated for all that he has suffered, if you find that he has suffered, but it ought not to be exaggerated on account of any sympathy you may have with him, but it ought to be reasonable, based upon the evidence, and you may use your common sense and your common observation of men, and what suffering, that you may have had yourselves in order to enable you to determine what would be a reasonable compensation for

such pain and suffering as he sustained as the direct and immediate consequence of this injury, if you find that such pain and suffering were the direct and immediate results of the negligent conduct of the defendant."

(This is defendant's exception No. 33. Record, page 107.)

We earnestly insist that this charge is erroneous. It contains the statement that the law lays down no definite rule for measuring damages, and then permits the jury to consider any suffering that they may have had themselves in order to determine what would be a reasonable compensation. This permits the jury to go far afield and determine the issue of damages upon other considerations than the evidence in the case. Juries should act on the evidence and not o their personal feelings.

A similar instruction was given by the trial Court in *Shepard v. Telegraph Co.*, 143 N. C., at page 246, and the Supreme Court of North Carolina held it to be erroneous. Chief Justice Clark says:

"Nor can we approve his Honor's instruction that the jury had 'a right to take into consideration their own feelings.' If this was correct, damages would depend, not upon evidence, but the difference in the feelings of the individuals composing a jury. A jury has no right to do more than give the plaintiff a fair recompense for the anguish he suffered from the negligence of the defendant, the amount to be determined, not by their own feelings, but by the evidence."

Shepard v. Telegraph Co., 143 N. C., at page 246.

An instruction which permitted the jury to consider matters extraneous to the record was condemned in *Norfolk & W. R. Co. v. Holbrook*, 235 U. S., 625.

Formal Exceptions.

The following formal exceptions upon which the defendant relies, are fully covered by the foregoing argument:

For that the court overruled defendant's motion for judgment on obstante veredicto, upon the coming in of the verdict.

This is defendant's exception No. 36. (Record, page 113.)

For that the court overruled the defendant's motion to set the verdict aside because the amount of damages awarded is excessive.

This is defendant's exception No. 37. (Record, page 113.)

For that the court overruled the defendant's motion to set the verdict aside as against the weight of evidence.

This is defendant's exception No. 38. (Record, page 113.)

For that the court overruled defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, and in the court's charge to the jury, and in permitting plaintiff to amend his complaint so as to bring his cause of action within the provisions of the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and in refusing defendant's motions for judgment of nonsuit and to dismiss the action.

This is defendant's exception No. 39. (Record, page 113.)

For that the court signed judgment as appears in the record.

This is defendant's exception No. 40. (Record, page 115.)

Conclusion.

In conclusion, the plaintiff in error refers the Court to the dissenting opinion of Associate Justice Brown, of the Supreme Court of North Carolina ,which is concurred in by Associate Justice Walker, as containing a very exhaustive discussion of the questions involved in this case. The conclusion is reached by Mr. Justice Brown that the judgment should be reversed upon three grounds: First, the cause of

action set forth in the amended complaint cannot be maintained because it is asserted for the first time after the expiration of more than two years from the time the cause of action accrued; second, the evidence is insufficient to go to the jury upon the question of the negligence of the plaintiff in error, and, third, the evidence establishes as a matter of law that the plaintiff assumed the risk.

For the errors which we have attempted to point out and establish by argument and the authorities, we ask that the judgment of the Supreme Court of North Carolina be reversed.

Respectfully submitted,

MURRAY ALLEN,

Attorney for Plaintiff in Error.

Raleigh, N. C., March 23, 1916.

APPENDIX

SPECIFICATIONS OF ERROR

The plaintiff in error specifies and relies upon the following errors committed by the Supreme Court of North Carolina:

1. For that the Supreme Court of North Carolina erred in its construction of the Federal Emyloyers' Liability Act, a statute of the United States, approved by Congress on the 22d day of April, 1908, especially in the construction of Sections 1, 3, 4 and 6.

2. For that by these errors the Supreme Court of North Carolina decided against the rights set up and claimed by your petitioner under the said statute and denied to your petitioner a correct construction, interpretation, and application of the provision of said statute.

3. For that the Supreme Court of North Carolina committed error in sustaining the trial court in overruling certain contentions made by plaintiff in error asserting a construction of the Federal Employers' Liability Act, approved by Congress, April 22, 1908, which, if acceded to, would presumably have produced a verdict in favor of plaintiff in error, and consequent immunity from the action.

4. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 1 of said act, thereby denying to Seaboard Air Line Railway

the right, privilege or immunity aforesaid, which it duly and specially set up in this proceeding.

5. For that the Supreme Court of North Carolina erred, and its decision was against the rights set up and claimed by your petitioner under Section 1 of the said Act of Congress, because of the holdings of the Supreme Court of North Carolina in construing certain instructions given and refused upon the first issue submitted to the jury, to-wit: Was the plaintiff in error injured by the negligence of the defendant, which said errors are more particularly set forth as follows:

6. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling dedefendant's motion for judgment of nonsuit at the conclusion of plaintiff's evidence upon the ground that the evidence offered by the plaintiff failed to establish negligence on the part of the defendant as alleged in the complaint. This was defendant's exception No. 9.

7. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's motion for judgment of nonsuit made at the conclusion of all the evidence. This was defendant's exception No. 17.

8. For that the Supreme Court of North Carolina erred in overruling the 18th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's first request to charge the jury as follows:

"1. The Court charges you that if you believe the evidence in this case, the plaintiff was not injured by any negligence on the part of the defendant, and you will answer the first issue 'No.'"

9. For that the Supreme Court of North Carolina erred in overruling the 22d exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 8th request to charge the jury as follows:

"8. A railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track, and if the plaintiff slipped on such snow or ice, you will answer the first issue 'No.' "

10. For that the Supreme Court of North Carolina erred in overruling the 24th exception of the plaintiff in error and in holding that the trial court committed no error in instructing the jury as follows:

"The extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workman."

11. For that the Supreme Court of North Carolina erred in overruling the 25th exception of the plaintiff in error and holding that the trial court committed no error in instructing the jury as follows:

"If the evidence satisfies you by its geater weight that the defendant failed in the performance of this duty, and by reason of such failure permitted ice to accumulate upon a path which was the usual path traveled by its employees to and from the pump house to the track, and by reason of such failure and as a proximate cause thereof, the plaintiff slipped and fell and injured himself, then your answer to this first issue would be 'Yes'; unless you are saisfied, your answer would be 'No.' "

12. For that the Supreme Court of Norh Carolina committed error in affirming the judgment in this case, because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 1, and the Act of Congress, approved April 22, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of plaintiff in error by an erroneous construction of Section 3 of said act, thereby denying to Seaboard Air Line Railway the right, privilege

or immunity aforesaid, which is duly and especially set up in this proceeding.

13. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 3 of said Federal Employers' Liability Act, approved by Congress of the United States, April 22, 1908, because of the holdings of the Supreme Court of North Carolina in construing said act and because of certain instructions given by the trial court and approved by said Supreme Court upon the effect of contributory negligence, upon the amount of damage to which defendant in error would be entitled and upon the duty of the jury in answering the third issue, to-wit: What amount of damages is the plaintiff entitled to recover of the defendant, which said errors are as follows:

14. For that the Supreme Court of North Carolina erred in overruling the 20th exception of plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 3d request for special instruction to the jury as follows:

"If you do not answer the issue of assumption of risk 'Yes,' and do answer the issue of negligence 'Yes,' then the court instructs you that the plaintiff by his own negligence contributed to his injury and you will answer the issue of contributory negligence 'Yes,'"

15. For that the Supreme Court of North Carolina erred in its construction and application of Section 4 of the Federal Employers' Liability Act of 1908 in overruling the 19th exception of the plaintiff in error and in holding that the trial court committed no error in refusing to give plaintiff in error's 2d request for special instruction to the jury as follows:

"The court charges you that upon all the evidence in this case, the plaintiff assumed the risk of injury from falling on ice at the time and place testified to by plaintiff and you will answer the issue of assumption of risk 'Yes.'" This was defendant's exception No. 19.

16. For that the Supreme Court of North Carolina erred in its construction and application of Section 4 of the Federal Employers' Liability Act in holding that the trial court did not commit error in instructing the jury as follows:

"If the evidence does not satisfy you that exercising ordinary care he would have become aware, or could have become aware of the conditions there, and the risk arising, then you would answer this second issue 'No.'" This was defendant's exception No. 31.

17. For that the Supreme Court of North Carolina committed error in affirming the judgment in this case because it denied to the plaintiff in error, Seaboard Air Line Railway, the right, privilege or immunity of being governed in respect of the right of defendant in error to recover in this action solely by the Constitution of the United States, Section 8, Article 1, and the Act of Congress, approved April 22, 1908, known as the Federal Employers' Liability Act, as properly construed and in adjudging the liability of the plaintiff in error by an erroneous construction and application of Scetion 6 of said act, thereby denying to the Seaboard Air Line Railway the right,, privilege or immunity aforesaid, which it duly and especially set up in this proceeding.

18. For that the Supreme Court of North Carolina erred and its decision was against the rights set up and claimed by plaintiff in error under Section 6 of said Federal Employers' Liability Act because of the holdings of said court in construing said act and in upholding the trial court in permitting an amendment to the complaint, and in refusing motion of the plaintiff in error to dismiss the action and in giving certain instructions to the jury and in refusing to give certain instructions requested by plaintiff in error upon the 6th issue, to-wit: Did plaintiff's cause of action accrue more than two years before the amendment of his complaint was filed? which said errors are as follows:

19. For that the Supreme Court of North Carolina erred

in sustaining the action of the trial court in overruling plaintiff in error's motion for judgment of nonsuit and to dismiss the action made at the conclusion of plaintiff's evidence upon the ground that the cause of action aleged in the complaint is based upon the common law and the statute law of the State of North Carolina, and the plaintiff's proof shows that he was employed by a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States at the time of his injury, and was at the time of his injury employed by such carrier in such commerce, and the cause of action proved arises under the Act of Congress of the United States of April 22, 1908, known as the Federal Employers' Liability Act; that there is no allegation in the complaint that the plaintiff was employed in interstate commerce and no allegation of facts constituting a cause of action under the Act of Congress; that the case proved was not pleaded and there is a total variance in pleading and proof. This was defendant's exception No. 9.

20. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of the amendment to the complaint alleging that at the time plaintiff sustained the injury complained of, he was employed in interstate commerce, upon the ground that it introduces a new cause of action, to-wit: A cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section 6 of the said Act of Congress providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues,

and it appears from the plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the Act of Congress of April 22, 1908. This was defendant's exception No. 10.

21. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of the said amendment upon the ground that the court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. This was defendant's exception No. 11.

22. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the said amendment to the complaint upon the ground that it contains averments of facts which are not contained in the original complaint and which defendant should have an opportunity to prepare to defend, and asks for a continuance if the amendment is allowed. This was defendant's exception No. 12.

23. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of the following amendment to plaintiff's complaint upon the ground that it introduces a new cause of action, to-wit: A cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States, while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal

Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of Section 6 of the said Act of Congress, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from plaintiff's evidence and from the complaint filed in this action that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the Act of Congress of April 22, 1908:

"3a. That at the time the plaintiff suffered said injuries, he was in the regular employment of the defendant as a pump repairer working as from time to time ordered by the defendant on the pumps used in connection with the line of defendant's railroad extending between the city of Raleigh, in the State of North Carolina, and the city of Richmond, in the State of Virginia; and at the time the plaintiff suffered said injuries, he had been sent by the defendant from his home in Raleigh, North Carolina, to Cochran, Virginia, to repair a pump of the defendant at said Cochran, Virginia, and he had visited and inspected said pump and discovered the need of a coupling or fitting or flange union which was not obtainable at Cochran, Virginia, and which he thought (as afterwards proved true) the defendant had at Skelton, Virginia; and the plaintiff, at the time of suffering said injuries, was going along the usual path from said pump past a water tank of the defendant at Cochran, Virginia, to board at Cochran, one of defendant's trains and to go to Skelton, Virginia, to get said needed part or appliance to be used by him in repairing a pipe connected with said pump at Cochran, Virginia, which pump had heretofore been and was thereafter to be used by defendant in pumping water into said tank at Cochran, Virginia, from which tank water was from time to time taken by trains of the defendant, some of which trains were at

such times being operated by defendant while engaged in interstate commerce, and that the train which the plaintiff was going to board and did board, was at said time engaged and operated by the defendant in interstate commerce; and that at said time the defendant was a railroad company engaged as a common carrier by railroad of freight and passengers in interstate commerce between the State of Virginia and the State of North Carolina. This was defendant's exception No. 13.

24. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of said amendment upon the ground that the court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. This was defendant's exception No. 14.

25. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's objection to the allowance of said amendment upon the ground that it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend, and asks for a continuance if the amendment is allowed. This was defendant's exception No. 15.

26. For that the Soupreme Court of North Carolina erred in sustaining the action of the trial court in refusing defendant's motion for judgment of nonsuit and to dismiss this action upon the ground that plaintiff failed to bring his action for injuries sustained while he was employed by the defendant in interstate commerce which arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, within two years from the date

the cause of action accrued, as required by Section 6 of said act. This was defendant's exception No. 17.

27. For that the Supreme Court of North Carolina erred in overruling plaintiff in error's 21st exception and in sustaining the action of the trial court in refusing to instruct the jury as requested by plaintiff in error as follows:

"The court instructs you upon all the evidence in this case you will answer the sixth issue 'Yes.'"

28. For that the Supreme Court of North Carolina erred in overruling plaintiff in error's 35th exception and in holding that the trial court did not commit error in instructing the jury as follows:

"As to the sixth issue, I charge you that if you find the facts to be as testified to by the witnesses, you will answer that 'No'; that is, as to whether the plaintiff's cause of action accrued more than two years before this complaint was filed. If you find the facts to be as testified to by the witnesses, you will find the fifth issue 'Yes,' and the sixth issue 'No.'"

29. For that the Supreme Court of North Carolina erred in its construction and application of Section 1 of the Federal Employers' Liability Act in holding that the trial court committed no error in admitting incompetent evidence for the purpose of establishing negligence on the part of plaintiff in error, as follows:

"Q. Why was the tank running over?

"By the court: Do you knew?

"A. Yes. Because the pumper was neglecting his duty, and let it continue to run after the tank was full." This was defendant's exceptions Nos. 6 and 7.

30. For that the Supreme Court of North Carolina erred in its construction and application of Section 3 of the Federal Employers' Liability Act in holding that the trial court committed no error in admitting incompetent evidence for the purpose of showing that defendant in error did not contribute to his injury by his own negligence, as follows:

"Did you cause your own fall in any way? A. No, I did not. I was just as careful walking as I could be." This was defendant's exception No. 1.

31. For that the Supreme Court of North Carolina erred in its construction and application of Section 1 of the Federal Employers' Liability Act in holding that the trial court committed no error in instructing the jury on the issue of damages, as follows:

"The plaintiff is entitled to recover as damages, if entitled to recover at all, one compensation for all injuries resulting from the defendant's negligent act. This damage embraces indemnity for loss of time, inability to perform labor or capacity to earn money, for injuries suffered by body or mind, which are the immediate and necessary consequence of the injury sustained. The plaintiff is to have a reasonable compensation for loss of bodily powers, actual suffering of mind or body, and also for any expense reasonably necessary which you find he may have incurred as a result of the injury sustained, which injury you find is the immediate necessary consequence of the defendant's negligent conduct, if it was negligent, to recover as damages one compensation for all loss which you find, by the greater weight of the evidence, the plaintiff has sustained in consequence of the defendant's negligent act." This was defendant's exception No. 32.

32. For that the Supreme Court of North Carolina erred in its construction and application of Section 1 of the Federal Employers' Liability Act in holding that the trial court committed no error in instructing the jury on the issue of damages, as follows:

"In the nature of things, it is impossible for the law to lay down any definite rule, but it says to the jury that they should award a reasonable compensation, with the emphasis on the word 'reasonable.' He is to be compensated for all that he has suffered, if you find that he has suffered, but it ought not to be exaggerated on account of any sympathy

that you may have with him, but it ought to be reasonable, based upon the evidence, and you may use your common sense and your common observation of men, and what suffering that men undergo, and of any suffering that you may have had yourselves in order to enable you to determine what would be a reasonable compensaiton for such pain and suffering as he sustained as the direct and immediate consequence of this injury, if you find that such pain and suffering were the direct and immediate results of the negligent conduct of the defendant." This was defendant's exception No. 33.

33. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling plaintiff in error's motion for judgment of nonsuit *non obstante veredicto* upon the coming in of the verdict. This was defendant's exception No. 36.

36. For that the Supreme Court of North Carolina erred in sustaining the action of the trial court in overruling defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, and in the court's charge to the jury, and in permitting plaintiff to amend his complaint so as to bring his cause of action within the provisions of the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and in refusing defendant's motions for judgment of nonsuit, and to dismiss the action. This was defendant's exception No. 39.

35. For that the Supreme Court of North Carolina erred in overruling exception No. 40 of the plaintiff in error and in holding that the trial court properly signed the judgment in this case in favor of the defendant in error.

36. For that the Supreme Court of North Carolina committed error in affirming the judgment rendered in this action because the said judgment denied to the plaintiff in error, Seaboard Air Line Railway, a construction of the

Federal Employers' Liability Act to which it was entitled and which, if granted, would have defeated the right of defendant in error to recover in this action.

37. The Supreme Court of North Carolina, for the various reasons above set forth, committed error in rendering the final judgment it did render against the plaintiff in error in this action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,

v.

J. T. RENN,
Defendant in Error.

No. 773

In Error to the Supreme Court of North Carolina

Brief of plaintiff in error in reply to motions on behalf of defendant in error to dismiss the writ of error, or affirm the opinion and judgment of the Supreme Court of North Carolina, and to transfer this cause to the Summary Docket.

MURRAY ALLEN,
Counsel for Plaintiff in Error.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1915

SEABOARD AIR LINE RAILWAY

Plaintiff in Error

V.

J. T. RENN

Defendant in Error

No. 773

In Error to the Supreme Court of North Carolina

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO MOTIONS ON BEHALF OF DEFENDANT IN ERROR TO DISMISS THE WRIT OR AFFIRM THE OPINION AND JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA, AND TO TRANSFER THIS CAUSE TO THE SUMMARY DOCKET.

STATEMENT OF THE CASE

This is an action brought by the plaintiff to recover damages for personal injuries, alleged to have been received at Cochran, Va., on June 14th, 1912. Plaintiff testified that he had gone to Cochran for the purpose of repairing a pump which supplied water to a tank, from which tank engines on the defendant's railroad drawing interstate trains were supplied with water; that he reached Cochran late in the

evening and went at once to the pump; that he found upon examining the pump that it would be necessary for him to secure parts at another station; that at this time one of defendant's trains was standing on the track at Cochran, and was about to start to the point to which he desired to go; that he left the pump and was walking by the usual path around the water tank and was passing between the water tank and tool house to reach the train, when he slipped on the ice and sustained the injuries complained of. Plaintiff testified that it was an extremely cold night and all of the witnesses in the case testified that there was a great deal of ice everywhere around Cochran. The basis of plaintiff's complaint is that ice was negligently permitted to accumulate and remain in the path. Plaintiff testified that at the time he fell he was hurrying up a slight incline in order to catch the train; that the ice was covered with snow and he did not see it at the time of the fall. Frank Parks, a witness for the plaintiff, testified that he was in the employment of the defendant at Cochran and that he had seen the ice at this point on the day of plaintiff's injury; that the ice was formed from the overflow of the tank. The defendant's evidence tended to show that if the tank overflowed the water would accumulate in a different direction from the point at which plaintiff fell. The defendant contended that the condition of the weather was such that it was impossible to prevent ice forming upon the ground around the water tank; that the plaintiff had knowledge that ice would be found around water tanks in cold weather, and that he assumed the risk of injury by slipping on the same. Issues of negligence, contributory negligence, assumption of risk and damages were submitted, and verdict rendered in favor of the plaintiff for $3,500, from which the defendant appealed to the Supreme Court of North Carolina.

The Supreme Court of North Carolina affirmed this judgment and the case is now before the Court on writ of error.

It appeared from plaintiff's evidence that he was em-

ployed in interstate commerce at the time of the alleged injury. At the conclusion of plaintiff's evidence, motion was made by the plaintiff to amend his complaint so as to state facts which would bring the action within the provisions of the Federal Employers' Liability Act. Defendant objected to the allowance of this amendment upon the various grounds hereinafter set out. The objection was overruled and the plaintiff was permitted to amend.

Plaintiff's injuries were sustained January 14, 1912. Summons in this action was issued, commencing the suit, March 14, 1913, and the original complaint was filed March 26, 1913. (Record, pages 1 and 3.) This case was tried at June Term, 1915, of the Superior Court of Wake Couty. (Record, page 15.)

The original complaint, filed by plaintiff, was in the following language:

> "The plaintiff, for his complaint, says:
>
> 1. That he is, and at the times hereinafter mentioned was a resident of Wake County, North Carolina.
>
> 2. That the defendant is, and at the times hereinafter mentioned, was a corporation existing and doing business under the laws of the State of North Carolina, and was operating a line of railroad in the State of North Carolina and in the State of Virginia, and elsewhere.
>
> 3. That on the 14th day of January, 1912, the plaintiff was in the employment of the defendant and in the discharge of the duties of his said employment it became and was proper and necessary for the plaintiff to traverse a certain piece of ground beside the railroad track of the defendant and within its right of way at or near the station known as Cochran, Virginia, and to do so hurriedly in order to get aboard a train of cars then and there being operated by the defendant; that at the said time it was snowing and the ground had become and was covered and hidden by snow; that the

defendant had carelessly and negligently caused, permitted and allowed water to be poured or spilled upon the ground at said place and to become frozen, thereby covering the ground for a considerable space with a sheet of ice, and the defendant had negligently permitted and allowed the said ice to be and remain upon the said ground at the said place, and to become and be covered and hidden by the snow, and had thereby negligently caused a highly dangerous condition to exist and the said place and condition was highly dangerous and perilous, and the defendant had negligently failed to warn the plaintiff in any manner of the existence of said danger; and on account of the negligence of the defendant in the particulars aforesaid, the plaintiff, while proceeding along the said ground in the exercise of ordinary prudence and care, and without notice, knowledge or information or warning of any kind of the existence of said danger, was caused to slip and fall heavily upon the ground, and thereby his collar bone and other bones were injured and dislocated, and he was bruised and wrenched and strained and sprained, and he was caused to suffer other serious, painful, dangerous, and permanent injuries to the muscles, bones, nerves and ligaments of his body, head and extremities, and caused to suffer much pain and anguish of body and mind.

4. That on account of the negligence of the defendant as aforesaid, the plaintiff has been damaged in the sum of ten thousand $10,000) dollars.

Wherefore, the plaintiff prays judgment that he recover of the defendant the sum of ten thousand dollars damages, and the costs of this action, and that he have such other relief as may be proper."

The defendant filed answer to this complaint, denying that plaintiff was injured by any negligence on its part and pleading assumption of risk and contributory negli-

gence as defenses. (Record, page 5.) No reference is made in the answer to the Federal Act, and no facts are set forth which would make the provisions of it applicable.

It developed on cross examination of plaintiff, and from the testimony of plaintiff's witnesses, that he was employed in interstate commerce at the time of his injury and the defendant was engaged in interstate commerce. This made the case one arising under the Federal Employers Liability Act (35 U. S. Stat. at L., C. 149), and at the conclusion of the evidence defendant moved to nonsuit plaintiff upon the ground, among others, that he had pleaded a cause of action under the common law and State statute and had proved a case under a Federal Statute, and that this was a fatal variance.

Defendant's motion for judgment of nonsuit was set out in the following language:

"Defendant moves for judgment of nonsuit upon the ground that the evidence offered by the plaintiff fails to establish negligence on the part of the defendant as alleged in the complaint. The defendant moves for judgment of nonsuit and to dismiss the plaintiff's action upon the further ground that the cause of action alleged in the complaint is based upon the common law and the statute law of the State of North Carolina, and the plaintiff's proof shows that he was employed by a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States at the time of his injury and was at the time of his injury employed by such carrier in such commerce, and the cause of action proved arises under the Act of Congress of the United States of April 22, 1908, known as the Federal Employers' Liability Act; that there is no allegation in the complaint that the plaintiff was employed in interstate commerce and no allegation of facts consituting a cause of action under the Act of Congress; that the case proved was not pleaded and there is a total variance in pleading and proof."

Motion overruled and defendant excepts. (Exception No. 9, record, page 37.)

This motion for judgment of nonsuit was renewed at the conclusion of all the evidence. (Exception No. 17, record, page 44.)

When the motion for judgment of nonsuit was first made plaintiff moved to amend his complaint so as to allege that he was employed in interstate commerce at the time of his injury and thereby bring his case within the terms of the Federal Act. Defendant objected to this amendment upon the following grounds:

1. That it introduces a new cause of action, to-wit, a cause of action for injury to an employee of a common carrier by railroad engaging in commerce between the States of Virginia and North Carolina and other States, while he is employed by such carrier in such commerce, which cause of action arises under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and which cause of action is not pleaded in the original complaint and is barred by the provisions of section 6 of the said Act of Congress, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrues, and it appears from plaintiff's evidence and from the complaint filed in this action, that plaintiff's cause of action accrued on the 14th day of January, 1912, more than two years before the amendment was offered, and the plaintiff has failed to comply with the provisions of said Section 6 of the Act of Congress of April 22, 1908. (Exception No. 10, record, page 38.)

2. That the court has no power to allow it, because said amendment will change the cause of action alleged in the complaint and will allege a new cause of action under the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and will be a departure in the substance of the action and a departure in the law on which it is founded. (Exception No. 11, record, page 38.)

3. That it contains averments of facts which were not contained in the original complaint and which defendant should have an opportunity to prepare to defend, and asks for a continuance if the amendment is allowed. (Exception No. 12, record, page 38.)

The court permitted plaintiff, over defendant's objection and exception, to file the following amendment to his complaint:

"3a. That at the time plaintiff suffered said injuries he was in the regular employment of the defendant as a pump repairer working as from time to time ordered by the defendant on the pumps used in connection with the line of defendant's railroad extending between the city of Raleigh, in the State of North Carolina, and the city of Richmond, in the State of Virginia, and at the time the plaintiff suffered said injuries he had been sent by the defendant from his home in Raleigh, North Carolina, to Cochran, Virginia, to repair a pump of the defendant at said Cochran, Virginia, and he had visited and inspected said pump and discovered the need of a coupling or fitting or flange or union which was not obtainable at Cochran, Virginia, and which he thought (as afterwards proved true) the defendant had at Skelton, Virginia; and the plaintiff, at the time of suffering said injuries, was going along the usual path from said pump past a water tank of the defendant at Cochran, Virginia, to board at Cochran, Virginia, one of defendant's trains and to go to said Skelton, Virginia, to get said needed part or appliance to be used by him in repairing a pipe connected with the said pump at Cochran, Virginia, which pump had theretofore been and was thereafter to be used by the defendant in pumping water into the said tank at Cochran, Virginia, from which tank water was from time to time taken by trains of the defendant, some of which trains were at such times being operated by defendant while engaged in interstate commerce, and that the train which the plaintiff was going to board and did board was at said time

engaged and operated by the defendant in interstate commerce; and that at said time defendant was a railroad company engaged as a common carrier by railroad of freight and passengers in interstate commerce between the State of Virginia and the State of North Carolina."

Defendant again objected to this amendment upon the grounds above set forth and again excepted to the action of the court in overruling its objections. (Exceptions Nos. 13, 14 and 15, record, page 41.) Defendant then filed answer to this amendment to the complaint admitting that plaintiff was employed in interstate commerce at the time of his injury and pleading the provisions of Section 6 of the Federal Employers' Liability Act, providing that an action under the act must be brought within two years as a bar to plaintiff's right to maintain the action set forth in the amendment to his complaint. (Record, page 10.)

An examination of the assignments of error will show that they may be appropriately grouped under the following heads:

1. The right to permit a complaint stating a cause of action under the state law and at common law to be amended so as to state a cause of action under the Federal Employers' Liability Act after the expiration of more than two years from the time the cause of action accrued.

2. The sufficiency of the evidence, as matter of law, to be submitted to the jury on the question of negligence of the defendant in failing to keep the path on which plaintiff was walking at the time he sustained injury.

3. The assumption of risk by plaintiff of injury from falling on ice and snow at point near defendant's water tank.

4. The admissibility of evidence on the question of negligence, which the defendant contends denied it a proper construction and application of the Federal Act.

5. The failure of the court to properly instruct the jury on the measure of damages under the Federal Act.

Motion to Dismiss for Want of Jurisdiction.

It has been conclusively decided by the repeated adjudications of this Court that cases from the State Courts involving the operation and effect of the Federal Employers' Liability Act are reviewable by the Supreme Court on writ of error.

St. Louis, Iron Mountain & Southern Ry. v. McWhirter, 229 U. S., 265.

St. Louis, Iron Mountain & Southern Ry. v. Taylor, 210 U. S., 292.

Seaboard Air Line Railway v. Duval, 225 U. S., 483.

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

The defendant resisted the amendment of plaintiff's complaint upon the ground that it denied the protection of Section 6 of the Federal Act. After this amendment was permitted, the case was tried as one arising under the Federal Act.

It is the contention of plaintiff in error that it has been denied a proper construction and application of the Federal Employers' Liability Act, and the right to be shielded from responsibility under the act when properly applied, as shown by its exceptions based upon the following grounds:

1. Error in refusing to hold that there was not sufficient evidence of negligence to be submitted to the jury.

2. Error in permitting plaintiff to amend his complaint, which stated a cause of action under the state statute and at common law, so as to allege a cause of action based upon the Federal Employers' Liability Act after the expiration of more than two years from the time the cause of action accrued, thereby denying the defendant the protection of Section 6 of the Federal Act.

3. Error in refusing to hold as a matter of law that plaintiff assumed the risk of falling on ice and snow.

4. Error in instructing the jury on the measure of damages.

These assignments of error will be discussed more fully under appropriate heads in other parts of this brief.

The question of jurisdiction to review cases of this class has received the consideration of this court in a recent opinion by the Chief Justice in which it is said:

> "Is there jurisdiction to review the action of the court below in affirming the judgment of the trial court, which was entered on the verdict of the jury, and if so, was error below committed, are the questions for decision.
>
> "The suit was brought to recover damages alleged to have been suffered by the death of Lewis H. Padgett, a railroad engineer in the service of the defendant company, the plaintiff in error, caused by his having fallen during the early morning hours into a drop pit in a locomotive roundhouse belonging to the company. The negligence charged was not only the failure to cover the pit, but also to properly light the roundhouse. If our jurisdiction attached, it can only be because the right to recover was based upon the Act of Congress commonly known as the Employers' Liability Act, it having been averred that the deceased was an employee of the company, actually engaged in interstate commerce. But, as pointed out in *St. Louis, I. M. & S. R. Co. v. McWhirter,* 229 U. S., 265, 275, 57 L. Ed., 1179, 1185, 33 Sup. Ct. Rep., 858, although the cause of action relied upon was based upon the Federal Statute, nevertheless, 'as it comes here from a State court, our power to review is controlled by Rev. Stat., Section 709 (Section 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, Section 1214)) and we may therefore not consider merely incidental questions not Federal in character, that is, which do not in their essence involve the existence of the right

in the plaintiff to recover under the Federal Statute to which his recourse by the pleadings was exclusively confined, or the converse; that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result. *Seaboard Air Line R. Co. v. Duval,* 225 U. S., 477 56 L. Ed., 1171, 32 Sup. Ct. Rep., 790; *St. Louis, I. M. & S. R. Co. v. Taylor,* 210 U. S., 281, 52 L. Ed.,1061, 28 Sup. Ct. Rep., 616, 21 Am. Neg. Rep., 464. "The existence of jurisdiction to review under the principles just stated depends not merely upon form, but upon substance; that is, in this class of cases, as in others, the general rule controls that power to review cannot arise from the mere assertion of a formal right when such asserted right is so wanting in foundation and unsubstantial as to be devoid of all merit and frivolous. There is no doubt that the assignments of error on their face embrace Federal questions which give jurisdiction to review. We therefore exercise jurisdiction and come to consider the questions on their merits, incidentally pointing out in doing so the reasons why the questions are not of such a frivolous character as not to afford a basis for the authority to examine and dispose of them."

Seaboard Air Line Ry. v. Padgett, 35 S. C. Rep., 481.

Seaboard Air Line Ry. v. Koennecke, decided December 13, 1915.

Motion to Affirm.

We do not feel that this motion is seriously insisted upon by the defendant in error. The questions presented by the writ of error are important to the plaintiff in error and were so regarded by the Supreme Court of North Carolina, as is illustrated by the dissenting opinion of Mr. Justice Brown,

concurred in by Mr. Justice Walker, in which the plaintiff's right to recover damages under the Federal Act is denied in a strong argument well supported by the decisions of various State courts and of the United States Supreme Court. The questions presented are manifestly not frivolous. The fact that the decision is by a divided court, should relieve the plaintiff in error of the charge that the questions are frivolous and that the writ of error is taken only for delay. (Seaboard Air Line Railway v. Padgett, *supra.*) We submit that an examination of the assignments of error will fully establish that the motion of defendant in error to affirm the judgment of the Supreme Court of North Carolina is without merit.

Motion to Transfer to Summary Docket.

It will be difficult to present the questions involved in this case in the limited time allowed for argument of cases on the summary docket. The question of the right to amend the complaint has not heretofore been presented to this court. There are two lines of authorities, represented by *Southern Pac. R. Co. v. Wyler,* 158 U. S., 285, and *Missouri K. & T. Ry. v. Wulf,* 226 U. S., 570, upon the question of amendment of pleadings so as to set up a new cause of action after the expiration of the period within which the action could originally have been brought, and the plaintiff in error deems it important to have more time than that allotted to cases on the summary docket in which to present to the court the argument in support of its contention that upon the authority of the Wyler case and other decisions of this Court and other courts, the amendment of plaintiff's complaint, which was pemitted by the trial court constituted the statement of a new cause of action which was barred by Section 6 of the Federal Employers' Liability Act.

There are other questions which the plaintiff in error deems it important to present in the oral argument. The question of negligence in failing to keep the path, on which

plaintiff was walking, free from snow and ice, and the question of the assumption of risk by the employee of injury by falling on ice in the vicinity of a water tank, are questions on which we find no decision of this Court. We submit that this is not a case "of such a character as not to justify extended argument," a provided by Rule 6, Sub-section 6, and, therefore, it should not be transferred to the summary docket.

ARGUMENT.

Plaintiff Was at the Time of His Injury Employed in Interstate Commerce.

The plaintiff was in the employment of the defendant as a pumpman, whose duty it was to keep in condition for operation the pumps which supplied water to the tanks at various points in North Carolina and Virginia between Raleigh, N. C., and Richmond, Va., and between Norlina, N. C., and Portsmouth, Va. These tanks supplied water to defendant's engines when operated in intrastate and interstate commerce. At the time of his injury the pump at Cochran, Va., was in a defective condition and could not be used to supply water to the tank. Plaintiff had been sent to Cochran to remedy the defect. He had examined the pump and had found that it would be necessary for him to go to Skelton, Va., to secure the necessary material to make the repairs, and he was on his way from the pump to the train which would carry him to Skelton, Va., when he fell and sustained the injury of which he complains. The following language of Justice Van Devanter, in *Pederson v. Delaware L. & W. R. Co.*, 229 U. S., 146, settles the question of the character of plaintiff's employment:

> "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which defend- and was engaged, or was it so closely connected there-

with as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as engines and cars; and sound economic reasons unite with settled rules of law in demanding that all these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done."

There is complete analogy between bridges and tracks essential for the operation of trains in interstate commerce and pumps and tanks used to supply water for the engines used in such commerce, and the language of Justice Van Devanter in the Pendersen case is quite as applicable to the latter as the former. Continuing, he says:

"Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged . . . . The point is made that the plaintiff was not, at the time of his in-

jury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

See also the following cases:

North Carolina R. Co. v. Zachary, 232 U. S., 248;
St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S., 156;
N. Y. Ceutral & H. R. R. Co. v. Carr, 35 S. C. Rep., 780.

Plaintiff's Complaint States a Cause of Action Under the Statute of North Carolina Defining the Liability of a Railroad to its Employees, and Also Under the Common Law.

The North Carolina Statute is as follows:

"Any servant or employee of any railroad company operating in this State who shall suffer injury to his person or the personal representative of any such employee who shall have suffered death in the course of his services or employment with such company by the negligence, caredessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void." Revisal of North Carolina of 1905, Section 2646.

This is a public law, of which the courts of North Carolina take judicial notice without its being pleaded.

Hancock v. Railroad, 124 N. C., 222.

The plaintiff's complaint was evidently drawn with this statute in view. It alleges a defect in the "ways" of the defendant company in that the defendant permitted "water to be poured or spilled upon the ground within its right of way," and "to become frozen, thereby covering the ground for a considerable distance with a sheet of ice." Certainly the statute is applicable to the facts alleged, and if the allegations had been supported by the proof the action would have been tried under this statute.

The allegations also state a common law action, and if no state statute had existed, and no reference had been made in the evidence to the employment of the plaintiff in interstate commerce, the action would have been tried to a conclusion under the common law.

There is nothing in the complaint which remotely indicates that the plaintiff brought suit under the Federal Employers' Liability Act.

The Complaint Does Not State a Cause of Action Under the Federal Statute.

"Where a pleader seeks to state a cause of action under the statute, facts must be averred which bring the case within its provision."

Chicago & Erie R. Co. v. Haverick, Admr., 50 Ind. App. 425.

It is not necessary that the statute should be expressly referred to in the complaint in order to entitle plaintiff to

recover, but it is essential that facts should be alleged which bring plaintiff's case within the act.

Seaboard Air Line Railway v. Duvall, 225 U. S., 477;
North Carolina R. Co. v. Zachary, 232 U. S., 248;
Shade v. Northern P. R. Co., 206 F. 353;
Grand Trunk W. R. Co. v. Lindsay, 233 U. S., 42.

On the same grounds, where the case made by the evidence is within the Federal act, the defendant is entitled to the benefit of its provisions, though neither party has pleaded the act.

St. L. S. F. & T. R. Co. v. Seale, 229 U. S., 156.

It is no more necessary to refer to the Federal Act than to any other statute of the forum, but it is necessary for the complaint to contain an averment of facts bringing the case within the provisions of the statute.

Missouri K. & T. R. Co. v. Wulf, 226 U. S., 570;
Morrison v. B. & O. R. Co., 40 Appeal Cases, D. C., 391, 395.

That the Carrier was Engaged in Interstate Commerce and the Employee was Employed in such Commerce at the time of the Injury are Essential Allegations.

We submit that there is no allegation in the complaint in this action that the defendant was "engaging in the commerce between any of the several states" at the time plaintiff was injured. It will be found that section 2 contains the general allegation that the defendant "was operating a line of railroad in the State of North Carolina and in the State of Virginia, and elsewhere." The only other allegation in the complaint relating to the character of business in which the

defendant was engaged is contained in section 3, in which it is said that the plaintiff was preparing to board a train of cars at Cochran, Virginia, *then and there* being operated by the defendant. In the absence of evidence to the contrary, it will be presumed that a carrier operating a line of railroad in two states is engaging in intrastate commerce, and an action against such a carrier would be considered as arising under the state law, unless the complaint contained an allegation establishing the exceptional right of action created by the Federal statute. There are no facts set forth in this complaint which could be construed as alleging that at the time of the injury to the plaintiff the defendant was "engaging" in interstate commerce. Therefore, it lacks the first essential allegation of a cause of action based upon the Federal statute. The allegations to which we have referred would be entirely consistent with the statement of a cause of action under the state statute or at common law. In fact, section 2 is the usual allegation in the statement of such causes of action.

It is certain that there is no allegation that the plaintiff was employed in interstate commerce at the time alleged in the complaint. It has been held in numerous cases that this is an essential allegation. In fact, it is, by the language of the statute, made the fundamental fact essential to the right to maintain an action hereunder.

The Federal Employers' Liability Act of 1906 was declared to be unconstitutional because itembraced employees of a railroad engaged in interstate commerce, who were not employed in such commerce.

First Employers' Liability Cases, 207 U. S., 463.

The statute of 1908 met this objection by providing that the rights created should only exist in favor of employees of an interstate carrier "while employed by such carrier in such commerce." Certainly a restriction in its application essen-

tial to the very life of the act must be set forth in a pleading purporting to set up a claim to the benefits established by the act. No employee of a railroad engaged in interstate commerce is entitled to the benefits of the Federal Act unless at the time the injury was sustained he was employed by such carrier in such commerce.

When the sufficiency of this complaint is considered in the light of the recent decision of the United States Supreme Court in *Brinkmeier v. R. R.*, 224 U. S., 268, it becomes manifest that the very allegation which entitles the plaintiff to bring his action under the Federal Act has been omitted. Mr. Justice VanDevanter says:

> "This was an action to recover for personal injuries sustained by a brakeman while coupling two freight cars on a side track of the defendant railway company at Hutchinson, Kansas. The defendant prevailed in the state courts (81 Kan., 101, 105 Pac., 221), and the plaintiff brings the case here. The injury occurred November 12, 1900, and the action was begun March 15, 1901.
>
> The question first presented for decision is whether the petition stated a cause of action under the original safety appliance act of March 2, 1893, 25 Stat. at L., 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174, which made it unlawful for any common carrier engaged in interstate commerce by railroad "to haul or permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact," etc. The petition, if liberally construed, charged that defendant was a common carrier engaged in interstate commerce by railroad; that the cars in question were not equipped with couplers of the prescribed type, and that the plaintiff's injuries proximately resulted from the absence of such couplers; but there was no allegation that either of the cars was then

or at any time used in moving interstate traffic. The Supreme Court of the State held that in the absence of such an allegation the petition did not state a cause of action under the original act. We think that ruling was right. The terms of that act were such that its application depended, first, upon the carrier being engaged in interstate commerce by railroad; and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce. *Southern R. Co. v. United States,* 222 U. S., 20, 25 ante, 72, 74, 32 Sup. Ct. Rep., 2. The act was amended March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp., 1909, p. 1143, so as to include all cars 'used on any railroad engaged in interstate commerce,' but the amendment came too late to be of any avail to the plaintiff."

"In 1908, after the case had been twice tried without any decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the state, it is not subject to review by us. *Texas & N. O. R. Co. v. Miller,* 21 U. S., 408, 416, 55 L. Ed., 789, 796, 31 Sup. Ct. Rep. 534.

"It is also held that the evidence produced upon the third trial was not sufficient to sustain a recovery under the petition, and error is assigned upon this. As the petition did not state a cause of action under the safety appliance act, but at most a right of recovery at common law, the ruling upon the sufficiency of the evidence did not involve a Federal question, and so is not open to re-examination in this court.

> Finding no error in the record in respect of any Federal right, the judgment must be affirmed."

The like reason applies to the Employers' Liability Act which is in *pari materia* with the Safety Appliance Act.

N. C. R. Co. v. Zachary, 232 U. S., 248.

An examination of the cases decided by the Supreme Court will show that in the complaint in each case there was either a specific reference to the Federal statute as the basis of the cause of action, or the averment of facts showing that the defendant was engaged in interstate commerce, and that the employee was employed in such commerce at the time the cause of action accrued.

> "In an action for the death of an employee of a railway company struck by an engine, an allegation in the petition that the railroad company was engaged in interstate commerce at the time of the accident did not sufficiently show that the engine was so engaged at the time."

Ill. Cent. R. Co. v. Rogers, 221, -- 52.

> "An allegation that at the time of the injuries complained of plaintiff was injured while employed in interstate commerce, is in sufficient to state a cause of action under the Federal Act in the absence of any allegation that the defendant was a common carrier engaged in interstate commerce by railroad."

Walton v. Southern Ry. Co., 179 Fed. Rep., 175.

The Court Will Look Only to Pleadings to Determine the Basis of the Plaintiff's Cause of Action.

"To determine whether this action was originally brought under the state statute or the Federal statute, the courts will look to the plaintiff's own statement of his cause of action."

Hall v. L. & N. R. R. Co., 157 Fed, Rep., 464, 466.

"In constructing pleadings, it is to be presumed that the pleader has stated his case in the manner most favorable to himself."

Smith v. Buttner, 90 Cal., 95.
Chamberlin v. Blair, 58 Ill., 385.
4 Encyc. Pl. & Pr., 746.

"Whether a cause of action sued on originally is the same as that set out in an amended complaint is to be determined by the averments of the pleadings and not by what the pleader intended the pleadings should contain."

Kansas City v. Hart, 60 Kan., 684.
Haley v. Hobson, 68 Me., 167.

The courts always look to the plaintiff's pleadings to determine the character of his action. This is the rule for determining the jurisdiction of the Federal courts:

"If it does not appear at the outset that the suit is one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance, the suit must be dismissed."

Third St. & Suburban R. Co. v. Lewis, 173 U. S., 457, 460.

Unless it appears from the plaintiff's statement of his claim that the action is removable, this defect cannot be sup-

plied by any statement in the petition or in any subsequent pleading.

> Western Union Tel. Co. v. Southern & St. L. R. Co., 208 Fed., 266.

In *Minnesota v. Northern Securities Co.*, 194 U. S., 48, 64, it is said that the cases cited therein established beyond further question in that court "the rule that, under existing statutes regulating the jurisdiction of the courts of the United States, a case cannot be removed from a state court, as one arising under the Constitution or laws of the United States, unless the plaintiff's complaint, bill or declaration shows it to be a case of that character."

> "The jurisdictional question must be determined by the record at the time of the transfer of the case."
>
> Washington & Idaho R. Co. v. Couer D'Alene R. & Nav. Co., 160 U. S., 77.

The Cause of Action Created by the Federal Statute is Separate and Distinct from the Cause of Action Created by the State Statute or Arising Under the Common Law.

"Facts which give the right to recover under the state law, and those which give the right to recover under the Federal Statute, constitute separate and distinct causes of action, for the Federal Statute is exclusive where the incident is embraced within interstate commerce service and does not apply where it is in intrastate service."

> Midland Valley R. Co. v. Ennis, (Ark.), 159 S. W. 215.

The title of the Federal Act indicates clearly that it deals with the cause of action as well as the defenses available to

the carrier. It is: "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases." Omitting extraneous words the first section provides: Every common carrier by railroad while engaging in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce.

In holding that this act is supreme in its sphere and supersedes the laws of the states in so far as they cover the same subject, Mr. Justice Van Devanter, in the *Mondou case,* 223 U. S., 1, says:

> "True, prior to the present act, the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of actions by Congress." Again, it is said in the Mondou case: "We conclude that *rights arising under the congressional act* may be enforced, as of right, in the courts of the states, when their jurisdiction, as prescribed by local laws, is adequate to the occasion." (Italics added.)

In *Michigan Central Railroad Company v. Vreeland,* 33 Supreme Court Reporter, 193, the United States Supreme Court says that the Employers' Liability Act "plainly declares the liability of the carrier to its injured servant," and that "by this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce." Again, the Court says: "This exertion of power which is granted in express terms, must supersede all legislation on the same subject by states . . . It, therefore, follows that, in respect to state legislation describing the liability of such

carriers for injuries to their employees engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the state."

In *St. Louis, I. M. & S. R. Co. v. Craft,* 237 U. S., 648, opinion by Mr. Justice Van Devanter, the Supreme Court, referring to the Employers' Liability Act, says:

> "The original act was adopted by Congress April 22, 1908. In its first section it provides for two dinstinct rights of action based upon altogether different principles, although primarily resting upon the same wrongful act or neglect. It invests the injured employee with a right to such damages as will compensate him for his personal loss and suffering—a right which arises only where his injuries are not immediately fatal. And where his injuries prove fatal, either immediately or subsequently (*Michigan Central R. R. Co. v. Vreeland,* 227 U. C., 268; *Louisville & St. Louis* R. R. Co., 152 U. S., 230, 238), it invests his personal representatives, as trustee for designated relatives, with a right to such damages as well compensate the latter for any pecuniary loss which they sustain by the death. At first there was no provison for a survival of the right of action given to the injured person, and so under the operation of the rule of the common law it would die with him."

> "There can be no doubt that *a right of recovery thereunder arises* only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce." (Italics added.)

Illinois Central R. Co. v. Behrens, 233 U. S., 473;
Pedersen v. D. L. & W. R. Co., 229 U. S., 150.

"The Federal Employers' Liability Act is more than a statutory declaration of the remedy to be pursued by an injured employee, it is the source of his right."

Taylor v. Taylor, 232 U. S., 363.

That the Federal Statute *creates* a cause of action is demonstrated by the very section limiting the period within which the action may be brought, Section 6. This is not a statute of limitations. While it restricts the remedy, as do statutes of limitations, it does more; it terminates the liability. What liability? Not the liability existing at common law, but the liability created by the act itself. There can be no doubt upon this question, unless our interpretation of the following language og the late Justice Lamar, is incorrect:

"There can, of course, be no doubt of the general principle that matters respecting the remedy—such as form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought. *McNeil v. Holbrook,* 12 Pet. 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, *by the statute giving the cause of action,* the lapse of time not only bars the remedy but destroys the liability. *Phillips v. Grand Trunk Ry.,* 237 U. S., ...; *Boyd v. Clark,* 8 Fed. 849; *Hollowell v. Horwick,* 14 Mass., 188; *Cooper v. Lyons,* 77 Tenn., 597 (2); *Newcomb v. Steamboat Co.,* 3 Iowa, 295. In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be aserted, would control even where the suit was brought in the courts of a state which

gave a longer period within which to sue." (Italics added.)

Central Vt. Ry. Co. v. White's Admx., 238 U. S., 507.

Seaboard Air Line Railway v. Koenneke, 36 S. C. Rep., 126.

The language of section 9, which was added by way of amendment by Congress April 5, 1910, shows beyond question that the Federal Employers' Liability Act gives the employee a right of action which did not exist prior to the enactment of this statute. It is provided by section 9: "That *any right given by this act* to a person suffering injury shall survive to his or her personal representative, etc."

The act deals with liability of carriers while engaged in commerce between the states for any injury resulting in whole or in part from the negligence of any of the employees of such carrier or by reason of any defect in its machinery, track, roadbed, or works.

Seaboard Air Line Railway v. Horton, 233 U. S., 492.

Under the authority of *Toledo, St. L. & W. R. Co. v. Slavin,* .... U. S., ..., if the complaint contains allegations of liability under the state statute, and, the proof establishes facts making applicable the Federal Law, judgment for the plaintiff cannot be sustained without proper amendment of the complaint. This is true because the complaint states facts constituting one cause of action and the proof establishes a separate cause of action. Otherwise, the verdict would cure the defect.

In the Slavin case it was contended that no advantage could be taken of the Federal Act because the pleadings contained no reference thereto. This contention was not sustained by the Supreme Court of the United States, but it

was held that allegations of liability under the state law may be met and destroyed by proof on the part of the defendant that at the time of the alleged injury plaintiff was employed in interstate commerce.

If the complaint sets forth a cause of action under the state law and the evidence discloses a cause of action under the Federal Statute, it is proper to direct verdict in favor of the defendant.

> Flanders v. Georgia, S. & F. Ry. Co., (Fla.) 67 So. 68.

Where there is no allegation of facts constituting a cause of action under the Federal Act and the proof shows that the employee was employed in interstate commerce, nonsuit is proper.

> Kamboris v. Oregon-Washington R. & Nav. Co. (Or.) 146 Pac. 1097.

> "By its last section a *right of action is conferred* (under conditions specified) for injury or death of the employees, 'resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, track, roadbed, works, boats, wharves, or other equipment.'" (Italics added.)

> Seaboard Air Line Railway v. Horton, 233 U. S., 492.

That the cause of action created by the Federal Act differs from a cause of action under the statute of the State of Pennsylvania is held in *Troxwell v. Delaware, L. & W. R. Co.*, 33 Sup. Ct. Rep. 274. In that case it appears that plaintiff had prosecuted to an unsuccessful conclusion an action for damages for the death of a railroad employee

based upon the state law. Subsequently suit was brought under the Federal Law to recover for such death. From judgment for plaintiff, defendant appealed. The Circuit Court of Appeals held that plaintiff's right to recover was *res adjudicata*. The Supreme Court denied the identity of the causes of action and sustained judgment for plaintiff.

After analyzing the two causes of action, Mr. Justice Day says:

> "We think it is apparent from what we have said that the first case was presented and tried upon the theory that it volved a cause of action under the state law of Pennsylvania. It was so submitted to the jury, and they were told that they were not to consider the Federal law, but recovery should be based upon the right under the state act. If the Circuit Court of Appeals was right in its second decision that no action could have been maintained under the state law, in view of the Employers' Liability Act, the fact that the plaintiff attempted to recover under that law, and pursued the supposed remedy until the court adjudged it never had existed, would not, of itself, preclude the subsequent pursuit of a remedy for relief to which in law she is entitled."
>
> "The true rule is that if the declaration or complaint does not disclose the action is based or grounded upon the statute, then the plaintiff is not seeking to recover for an injury received while engaged in interstate traffic of the defendant and the sufficiency of his pleadings must be measured by the general state law, the provisions of the statute not being involved. However, if the evidence discloses the case is one under the statute there will be a fatal variance and the plaintiff must fail."

Thornton's Federal Employers' Liability Act (2d Ed.) Sec. 140.

"When the question arises whether the Federal Act applies, the burden is upon the person asserting it to show that the facts at the time of the happening abated the original and primary sovereignty of the state, and permitted the exceptional and limited power of the Federal Government to attach.."

McAuliffe v. N. Y. C. & H. R. R. Co., 150 N. Y. Supp., 512.

The Plaintiff Had the Selection of the Basis of His Action·

"The plaintiff, and not the defendant, had the selection how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts."

St. Louis I. M. & S. R. Co. v. Hesterly, 33 S. C. Rep., 703.

If there had been doubt in plaintiff's mind as to the cause of action upon which he relied for his recovery, alternative allegations could have been inserted in his complaint based upon the State and Federal laws. This course is permissible under our practice, and the United States Supreme Court has said that there is nothing in the Federal Act to prevent it.

Wabash R. Co. v. Hayes, 34 S. C. Rep., 729.

Counts at common law and under the Federal Act may be joined.

Bouchard v. Central Vt. R. Co., 87 Vt., 399.
Pelton v. Ill. Cent. R. Co. (Iowa), 150 N. W., 236.
Ex parte Atlantic C. L. R. Co. (Ala.), 67 So., 256.

The Court Had no Power to Allow an Amendment Stating for the First Time a Cause of Action Under the Federal Act After the Expiration of the Period Fixed by the Act for the Commencement of Such Action.

Section 6 of the Federal Employers' Liability Act provides:

> "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

This is not a statute of limitation, but creates a condition precedent to the maintenancce of the cause of action. This section sets a limit to the existence of the cause of action created by the act. At the end of two years from the day it accrues, the cause of action ceases to exist.

> Atlantic Coast Line R. Co. v. Burnett, decided Nov. 29th, 1915.

The same reasoning, which denies to the courts the power to allow an amendment, which states a new cause of action after the operation of the statute of limitations, will apply in the present case.

> Bennett v. R. R., 159 N. C., 345.

"Statutes of limitation are statutes of quiet, and they are beneficent in that they put an end to disputed claims, prevent litigation, quiet titles, and give rest and repose. No matter what may be the criticisms of the casuist, in the law these statutes are no longer regarded as harsh, but furnish a defense, as meritorious as any other."

> Nelson v. Bank, 139 Ala., 578, 586.

In holding that "A common-law action for a personal injury resulting in death cannot be amended so as to count upon the right given by statute to recover, for the benefit of

the widow and next of kin, the damages resulting to them from the death," the Supreme Court of Maine in *Anderson v. Wetter,* 69 Vt., 105, says:

"The effect of this legislation is apparent. It was not to create a new remedy for an existing cause of action; but to create the cause of action itself where none existed before. It was therefore necessarily a new cause of acion—a new action. The two causes are inherently distinct, both in their nature and in their results. . . . . It is doubtless true that greater liberality than formerly is allowed in the matter of amendments, and that mere technicalities are not viewed with favor. But it is also true that well-established principles and precedents are not to be lightly set aside. 'It will not be wise to depart too far from the established rules of pleading. Constant departures from these rules will soon result in confusion. In the end it will be found that justice will be better subserved by adhering to the remedies provided by law than in departing from them.' *Lawry v. Lawry,* 88 Me., 482, 34 Atl., 273."

"Amendments are not admissible where the effect would be to prejudice acquired interests, or take away any defense which could be made to an action begun at the time of the amendment."

Henderson v. Graham, 84 N. C., 496.
Martin v. Young, 85 N. C., 157.
Gilliam v. Insurance Co., 121 N. C., 369.

"Where by an amendment a new charge is introduced against the defendant, he may make such defenses to it as if it were the foundation of an action then newly begun."

Christmas v. Mitchell, 38 N. C., 464.
Cogdell v. Exum, 69 N. C., 464.
Patterson v. Wadsworth, 94 N. C., 538.
Gillam v. Insurance Co., 121 N. C., 369.

"Where the cause of action is changed by an amended complaint, the defendant has a right to set up in the answer thereto any legal defense, including the statute of limitations, just as if the action had been commenced at the date of the amended complaint."

Sams v. Price, 121 N. C., 392.
Weldon v. Neal, 19 Q. B. Div., 394.

"When a suit by a foreign administrator, under Revisal, sec. 59, has been dismissed, and he has subsequently qualified as administrator here, his further proceeding to recover damages for the wrongful act causing the death of his intestate, should be by a separate and independent action; but when he has been permitted by the trial court, without objection, to become a party to the original suit and amend his pleadings to meet the changed conditions in this respect, his action will be deemed as commenced when he was made a party."

Hall v. Railroad, 149 N. C., 108.
Bennett v. Railroad, 159 N. C., 345.

In referring to the Federal Employers' Liability Act of 1906, which contained the same limitation as provided by Section 6 of the act of 1908, except that the period is one year instead of two, the Supreme Court of the District of Columbia says:

"The act in question creates a liability where none existed, and takes away defenses formerly available. Coupled with the enlargement of the liability of common carriers is the limitation that no action shall be maintained 'unless commenced within one year from the time the cause of action accrued.' The ordinary statute of limitations confers upon the defendant the privilege

of interposing a definite limitation of time as a bar to the enforcement of a liability existing independently of the statute defining the limitation. Such statutes, therefore, are merely limitations of the remedy. Statutes like the present are more. They create a right of action conditioned upon its enforcement within the prescribed period. The legislature having the power to create the right may affix the conditions under which it is to be enforced, and a compliance with those conditions is essential. 'The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are, therefore, to be treated as limitations of the right.' It is, therefore, necessary for one seeking to enforce a right under such statute to state a case within it, and time is of the essence of the right."

Morrison v. B. & O. R. Co., 40 App. Cases D. C., 391.

"The doctrine of the relation back of an amendment to the commencement of a suit is a fiction of the law, and should never be applied where it will operate to cut off a substantial right or defense to new matter introduced by an amendment, though the same be connected with the original cause of action."

Nelson v. Bank, 139 Ala., 578.

"The whole doctrine of relation back rests in a fiction of law, adopted to subserve, and not to defeat right and justice. When an amendment introduces a new right

> or new matter, not within the *lis pendens* and the issue between the parties, if, at the time of its introduction, as to such new right or matter the statute of limitations has operated a bar, the defendant may insist upon the benefit of the statute, and to him it is available as if the amendment were a new and independent suit."
>
> Mohr v. Lemle, 69 Ala., 180.

We submit that it does not meet this position to say that the amendment permitted by the Court in the present case was merely the "inserting other allegations material to the case," as authorized by Section 507 of the Revisal of North Carolina of 1905. This provision of the Revisal is nothing more than a legislative declaration of the rule that a defective statement of a good cause of action may be cured by amendment. Under this rule an amendment which would make a fuller statement of the plaintiff's claim at common law or under the North Carolina statute (Revisal, 2646) would be allowable, but, as is said in *Anderson v. Wetter*, 69 Atlantic (Me.), 115, "to insert an inconsistent count and a new and entirely different cause of action is 'a subversion of the rule.'" In fact, section 507 recognized the limitation to the right to amend pleadings for which we are now contending by providing that pleadings may be amended by the Court "*when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved.*"

In *Whalen v. Gordon*, 95 Fed. Rep., at page 313, Judge Sanborn says:

> "There are three established tests that are always useful to determine the identity of two causes of action. They are: Will the same evidence support both? Will the same measure of damages govern both? And will a judgment against one bar the other? Causes of action may differ, concerning which some of these questions

may be answered in the affirmative, but it can be safely said that no two causes of action can be indentical concerning which all these questions must be answered in the negative."

"The rule which governs the reciprocal effect of the doctrine of relation and the statute of limitations upon each other in the matter of amendments to petitions—a rule which seems to be universally sustained by the authorities—may be stated in these words: An amendment to a petition which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, not before introduced or made in the pending suit, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed."

Whalen v. Gordon, *supra.*

"To determine whether amendment asserts new matter or claim and relates back to the commencement of the suit, so as to cut off the plea of the statute of limitations the true criterion is, whether the matter pleaded amounts to a departure in after pleading as recognized at common law."

Nelson v. Bank, 139 Ala., 578.

"If the matter introduced in a complaint by way of an amendment introduces a new claim or a new cause of action requiring a different character of evidence for

> its support, and affording a different defense from that to the cause as originally presented, such amendment will not relate back to the commencement of the suit, so as to prevent the bar of the statute of limitations as to the new matter thus introduced, although the matter introduced might have been joined in a different count in the original complaint."
>
> Nelson v. Bank, *supra.*

In *Union Pac. R. Co. v. Wyler,* 158 U. S., 293, it is held that an amendment to a complaint, setting forth a cause of action under the general law of master and servant, which proposed to declare under a state statute regulating such action constituted a departure in pleading and set up a new cause of action, and that such amendment would not be permitted after the statute of limitations had run.

The Wyler case has repeatedly been cited with approval by the United States Supreme Court, and there has been no suggestion that the march of progress in judicial procedure has changed the principles of justice in pleading so exhaustively stated in the opinion of Chief Justice White.

> Atlantic & Pac. R. Co. v. Laird, 164 U. S., 396.
> United States v. Dalcour, 203 U. S., 408, 423.
> Missouri K. & T. R. Co. v. Wulf, 226 U. S., 570.
> St. L. I. M. & S. R. Co. v. Hesterly, 33 S. C. Rep., 703.

In the Dalcour case the Court says: "In the present case the change is a change in the allegations of fact, and was most material, because it necessarily was followed by a direct facing about with regard to the law. We shall not dispose of the case on this ground, but we think it proper to say that the difficulties in the way of upholding this amendment under the last mentioned decision (*Union Pac. R. Co. v. Wyler,* 158 U. S., 285), have not been removed from our minds."

In *Atlantic & Pacific R. Co. v. Laird,* 164 U. S., 396, Chief Justice White says:

> "The question to be determined, therefore, is whether the trial court erred in holding that the amendments effected by the second amended complaint did not set up a new cause of action; for, if the second amended complaint stated a distinct and independent cause of action, the bar of the statute should have been allowed to prevail. *Union Pacific R. Co. v. Wyler,* 158 U. S., 285."

We are aware of that line of cases of which the Cox case (145 U. S., 593) is an example, which hold that it is permissible to add by way of amendment allegations of facts which merely amplify the cause of action alleged, and that as to such amendments the bar of the statute is not applicable if the action was originally brought within the period of limitation.

There is a clear distinction in the Cox case and the present case. Certainly the distinguishing character of that case, when compared with the Wyler case (158 U. S., 293), upon which we rely and the controlling force of the Wyler case are made plain by the following language of Circuit Court Judge Sanborn in *Whalen v. Gordon,* 95 Federal, at page 305 *et seq.*

> "The rule is well illustrated in two of the cases from the Supreme Court cited above. In *Railroad v. Cox,* 145 U. S., 593, 12 Sup. Ct., 905, the original petition was for damages for negligence 'by reason of the defective condition of the cross ties and roadbed,' and the amendment for damages for negligence 'by reason of the drawhead and coupling pin not being suitable for the purpose for which they were to be used, and he being ignorant thereof, and of the defective condition of the track.' The Court held that the amendment only

amplified the statement of the negligence of the railroad company relative to the defective condition of the great machine it was operating which was made in the original petition, and that it did not state a new or different cause of action. In the last case in which the Supreme Court had occasion to consider this question (*Railway Co. v. Wyler*, 158 U. S., 293, 15 Sup. Ct., 877), the original petition was for negligence of the railway company in employing and retaining a fellow servant who was known to be incompetent, by means of whose incompetence and negligence a heavy iron dump was permitted to fall upon the plaintiff. The amendment counted upon the negligence of the same fellow servant and the statute of Kansas, which charges a railroad corporation with negligence of the fellow servants of the injured employee. The original petition counted upon a liability of the railroad company under the common law; the amendment, upon a liability under the statute of Kansas. Both causes of action were based on the same transaction and resulted from the same facts. The Supreme Court held that the amendment stated a new cause of action, and that it was barred by the statute of limitations. The opinion of the Supreme Court in this case seems to meet and dispose of the contention that since Iowa and the other states which have adopted the code system of pleading and practice have abolished all forms of action, and require the petition to contain 'a statement of the facts constituting the plaintiff's cause of action' only, a different rule should prevail in those states, and any cause of action arising out of the same transaction pleaded in the original petition should be permitted to be ingrafted by an amendment upon it, and allowed to relate back to the commencement of the action, although it had not been stated and no claim upon it had been made in the original pleading. We must not forget that, while forms of

actions are abolished in these states, the essential natures and causes of action are not abolished. An action for a money judgment upon a promissory note, and an action to foreclose a mortgage made to secure it, may be stated under the Code in the same form, and may arise out of the same transaction, but they differ widely in their grounds, their characteristics, and their results. The forms of actions of ejectment, trespass, and assault and battery may have disappeared, but the causes and characteristics of these actions still remain. Let a stranger wrongfully enter upon a homestead of an owner, break down the door of his house, forcibly eject him from his premises, and wrongfully retain them from him. That transaction gives rise to at least three causes of action, which, under the statutes of Iowa, have different periods of limitation; one for injuries to the person, with a limitation of two years; one for injury to the property, with a limitation of five years; and one for recovery of real estate, with a limitation of ten years. Ought the rule to prevail in the Code states that the owner of this property may set out the facts of this transaction, and demand a recovery of his real property only, keep his action upon this cause pending for nine years, and until the statute has run on his cause of action for injury to the person and to the property, and then revive them by ingrafting them upon his petition in ejectment by amendment in defiance of the statute of limitation, because they arose out of the same transaction as his cause of action to recover the land? It is as vital to the interests of society in the states which have adopted the code system of pleading as it is in the other states that these statutes of repose shall not be evaded or annulled, and this result can only be avoided by the application to the effect of amendments to pleadings of the general rule we have announced. It seems to us to have been adopted in all the states of the Union, and we

think it should be steadily and uniformly maintained and applied in the Federal courts.

This is evidently the view of this question which has been taken by the Supreme Court of the State of Iowa. In *Van De Haar v. Van Damseler*, 56 Iowa, 671, 676, 10 N. W. 227, the plaintiff brought an action for seduction. After the statute had run against the cause of action for rape she amended her complaint, and pleaded a cause of action for rape. Both causes of action arose out of the same transaction, and in each pleading she stated the facts constituting her cause of action according to the Code. The only difference in the two statements was that in one she conceded, and in the other she denied, her consent. Although these causes of action arose out of the same transaction, the Supreme Court of Iowa held that the cause stated in the amendment was different from that stated in the original petition, that the amendment did not relate back to the commencement of the action, and that the second cause of action was barred by the statute. An extended review of the authorities seems unnecessary, because this court is bound by the decision of the Supreme Court of the United States, and its opinion in Railway Co. v. Wyler appears to us to end debate. In that case the cause of action in the original petition arose out of the same transaction as did that stated in the amendment—out of the fact that a fellow servant negligently allowed a heavy iron dump to fall upon the plaintiff. The action was brought in a code state, where forms of action were abolished. The only difference in the statement of the two causes of action was that in the one the plaintiff counted on the known incompetency of the fellow servant through whose carelessness he was injured and the common law, and in the other on the negligence of the same fellow servant and the Statute of Kansas, which charges railroad companies with the negligence of such servants.

> The case was tried in the United States Circuit Court, which necessarily took judicial notice of the common law and of the Statute of Kansas. The truth is that both causes of action not only arose out of the same transaction, but under the same laws, and out of the same facts. The only real difference was that in the one the plaintiff claimed to recover under the common law, and in the other under the Statute of Kansas. But the Supreme Court held that this was a departure from law to law, and that the cause of action stated in the amendment was a new cause of action, and was barred by the statute."

There is another line of cases, illustrated by *Missouri K. & T. R. Co. v. Wulf,* 226 U. S., 570, in which it is held that an amendment in matter of form and not of substance may be permitted after the period of limitation fixed by the statute creating the cause of action has expired. That the decision of the Wulf case did not in any way lessen the force of the Wyler case in its application to the facts of our case appears from the opinion of Mr. Justice Pitney, and is further strengthened by reference to the authorities cited therein with approval.

The Cox and Laird cases have been discussed. The other cases cited by Justice Pitney are:

> Stewart v. Baltimore & Ohio R. Co., 168 U. S., 445.

Action was brought in the District of Columbia for damages for wrongful death based upon the statute of Maryland. The Court of Appeals was of opinion that the action could not be maintained under the Statute of the District of Columbia because that authorizes recovery only in case the injury causing death is done within the limits of the District, and under the Maryland Statute because of the peculiar form of remedy prescribed therein. The Supreme Court held that while, under the Maryland Statute, the state is the proper plaintiff and the jury trying the case is to apportion

the damages received, and, under the Act of Congress in force in the District of Columbia, the personal representative of the deceased is the proper plaintiff and the damages recovered are distributed by law, these differences were not sufficient to render the Statute of Maryland inconsistent with the Act of Congress or the further holding of the District of Columbia.

Pactillo v. Allen-West Commission Co., 131 Fed. 680.

"An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the state, a plaintiff is only required to state the facts which constitute his cause of action." (Headnote by the court, consisting of Sanborn, Van Devanter and Hook, Circuit Judges.)

McDonald v. Nebraska, 101 Fed., 171:

Action was originally brought in the name of the state treasurer against the receiver of an insolvent bank, to recover certain moneys belonging to the state on deposit in the bank. A demurrer was filed, based upon the incapacity of the treasurer to maintain suit, because the state appeared from the complaint to be the sole party in interest. The demurrer was sustained but, on motion, the court permitted the State of Nebraska to be substituted as the sole plaintiff.

The defendant entered the objection that the substitution to he state as plaintiff was a change of the cause of action and that as the statute of limitations had run against the plaintiff's claim before the substitution was made, the cause was barred. The Circuit Court of Appeals, Eighth District, in an opinion by Circuit Judge Caldwell, decided against this position upon the ground that, where either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff." In this case the action was for the same cause from beginning to end, and presented no question of the right to introduce a new cause of action after the expiration of the period of limitation.

Reardon v. Copper Co., 193 Fed., 189:

In this case the case of McDonald v. Nebraska is reviewed and followed in holding that it is proper to allow a complaint in an action brought by the father to recover damages for the death of his son to be amended by substituting the administrator as plaintiff in the action in place of the father, although the amendment is offered after the expiration of the period in which an action for death by wrongful act could be brought. After reviewing the McDonald case and several other cases to the same effect, District Judge Van Fleet says:

> "The principles announced in these cases are clearly applicable to the circumstances presented here. As we have seen, *no change has been worked in the form or substance of the cause of action set up. That remains in all respects the same.* The father is now, as he was when the original complaint was filed, the real party in interest, for whose benefit, under the express langu-

> age of the statute, the action may be maintained. He has then a right to have the action prosecuted, but the law says that that must be done through the instrumentality of the legal representative rather than that of the immediate beneficiary; and *this purely formal requirement* is all that is accomplished by the amendment allowed." (Italics added.)

In the case of *St. Louis I. M. & S. R. Co. v. Hesterly,* 228 U. S., 702., the United States Supreme Court makes it plain in the following language that the Wyler case was not overruled by the Wulf case:

> "The plaintiff, not the defendant, had the election how the suit should be brought, and as he related upon the state law, the defendant had on choice, if it was to defend upon the facts. Whether the defendant could have defeated the first count also on the ground that the plaintiff was suing upon a statute of one jurisdiction, whereas thea tcion could be maintained only on that of another, need not be decided, since the defendant asks reversal of only so much of the judgment as rests on the second count. Hence it is unnecessary to consider whether the principle of *Union P. R. C.o v. Wyler,* 158 U. S., 285, or that of *Missouri K. & T. R. Co. v. Wulf,* 226 U. S., 570, 577, should be applied. See further, *Troxwell v. Delaware, L. & W. R. Co.,* 227 U. S., 434, 442; *Northern P. R. Co. v. Slaght,* 205 U. S., 122, 131; *United States v. Dalcour,* 203 U. S., 408, 423."

The Wulf case seems to us to be quite clearly distinguishable from the present case. In that case it was alleged in the original complaint that the deceased, at thetime of his death, was in the employ of the defendant as a locomotive fireman, and in the performance of his duties as such upon a train bound from Parsons, in the State of Kansas, to Osage, in

the State of Oklahoma." The action was originally commenced by Sallie C. Wulf in her individual capacity. The amendment, tendered more than two years after the cause of action accrued, asked that the plaintiff be allowed to recover as administratrix. In holding that this amendment did not set up a new cause of action, and, therefore, related back to the commencement of the action, the court says:

> "It seems to us, however, that aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce." Again, the court says: "This change was in form rather than in substance."

And in distinguishing the Wyler case, it is said:

> "Since, in the present case, the Federal Statute did not need to be pleaded, and th meended petition set up no new facts as the ground of action, the decision in the Wyler case is not controlling."

Here is stated in brief the controlling distinction in the Wulf case and our case. The original complaint filed by Renn no reference to the Federal Statute and contains no allegation that at the time of his injury he was employed in interstate commerce. The amendment contains the *new facts* that he was employed in remedying a defect in an instrumentality used in interstate commerce and was about to board a train being operated between the States of Virginia and North Carolina. The allegations of the *new facts* made applicable a *new law*. There is departure from fact to fact and from law to law, thus violating in each detail the principles established by the Wyler case.

The Amendment Allowed by the Court States a New Cause of Action, Which is Barred by the Expiration of the Period of Limitation Fixed by the Act Creating the Right of Action.

Roberts, in his work on Injuries to Interstate Employees, (1915), Sections 162-163, says:

> "Where a mother, the sole heir and dependent of a deceased employee, a single man, sued in her individual capacity and in her first and original petition, sufficiently averred that his death was caused by injuries while the carrier was engaged and he was employed in interstate commerce, but also in her petition referred to and asserted a right to sue under the laws of Kansas, an amendment of the petition after the two-year period of limitation, permitting her to sue as administratrix as required by the Federal Act, was properly allowed. (*Missouri K. & T. R. Co. v. Wulf,* 226 U. S., 570.) In the Wulf case the decedent was a locomotive fireman on a train bound from Kansas into Oklahoma and these facts, constituting employment in interstate commerce, appeared in the original petition. Notwithstanding the fact that the plaintiff erroneously, under the facts stated in her petition, asserted her right to recover under the state laws, yet the court, when the facts stated in her petition showed liability exclusively under the Federal Act, would take judicial notice that the state law mentioned in the petition, was superseded by the Federal Act and that the cause of action was not changed any more than if the plaintiff had referred to any other repealed statute. Aside from the capacity in which she sued, there was no substantial difference between the original and the amended petition, the same state of facts as to interstate commerce being alleged in both. The change was in form rather than in substance nor did the amended petition set up any

different state of facts as the ground of action, and therefore, the amended petition realted back to the beginning of the suit. This case has been sometimes cited as authority for the proposition that a petition setting up no facts, showing the engagement of the carrier and the employment of it of the servant in interstate commerce at the time of the injury, may be amended even after the two-year period of limitation provided by the Federal Act, so as to show a cause of action, under the national statute. The decision, however, does not go to that length because the court found that the original petition sufficiently averred facts showing employment in interstate commerce, the sole change being the capacity in which the plaintiff sued. The mere fact that the plaintiff referred to the Kansas Statute in her petition as authorizing the recovery, the court treated as nugatory in view of the other facts showing liability under the national act. A former case (*Union P. R. Co. v. Wyler,* 158 U. S., 285), in which the plaintiff sued under the common law and sought after the limitation period to amend by basing his cause of action on the Statute of Kansas, was distinguished, in that the ground of recovery was changed, and the court, the suit being tried on removal in Federal Court in Missouri, would not take judicial notice of a Kansas Statute.

"But where an action for wrongful death was brought by deceased's widow as such, under a statute giving her alone the right of action, for her sole benefit, an amendment to the declaration, changing the relation in which she sues from that of widow to that of administratrix, for the benefit of herself as widow and her children, and changing her cause of action to one under the Federal Employers' Liability Act, while permissible, yet, if made under the limitaton perior under the latter statute, does not relate back to the time of the commencement of the original action so as to avoid the bar

of the statute of limitation, being in effect the bringing of a new action under the Federal Statute. ((*Hall v. L. & N. R. Co.,* 157 Fed., 464; 174 Fed., 1071.) The Hall case cited is quite different from the Wulf case for here the widow was the sole party in the original petition; the widow and children were asserting rights in the amended petition. Neither did the original petition states facts showing liability under the national act. In another case (*Allen v. Tuscarora Valley R. Co.,* 229 Pa., 97), a brakeman brought an action against a railroad company which stated a cause of action against the common law. The inquiry occurred on February 29, 1904. Suit was brought on July 1, 1904. On January 21, 1909, the plaintiff asked leave to file an amended petition setting up a cause of action under the Federal Safety Appliance Act and specifically under the section as to automatic couplers. Defendant objected to the allowance of the amendment upon the ground that it introduced a new cause of action which was barred by the statute of limitatio. The court sustained this assignment and held that the amended answer set up a new cause of action and was improperly allowed by the trial court is barred by the statute of limitation. The court, in passing upon the propriety of the amendment, said: "But, it will be observed, in the amendment there was a departure, not one from the facts as allowed in the original statement, but also from the law as applicable to the fact in the original statement. In other words, there was a departure, not one from fact to fact, but from law to law. . . . The original statement, it is true, averred the njuries of the plaintiff and the alleged negligence of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce or that the defendant's cars were equipped with couplers in violation of the

> Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the decisions in determining whether the amendment introduced a different cause of action. It is apparent that without this amendment the Act of Congress could have had no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff assumed ther isks of dangers of his employment."

In *Allen v. Tuscarora R. Co.,* 229 Pa., 97, cited in the foregoing text, it is held that the complaint in an action by a railroad employee for injuries caused by failure of the company to use cars equipped with couplers in ordinary use cannot, after the limitation period has elapsed, be amended so as to charge filure to comply with the Act of Congress requiring railroads to equip their cars with automatic couplers.

In so holding, the Supreme Court of Pennsylvania says:

> "The Act of Congress is the basis of the plaintiff's claim, as laid in the amended statement, while, in the original statement, the basis of the claim is the failure of the carrier to perform its common-law duty to him as its employee. The amendment is not a restatement, or the statement in a different form of the same cause of action, but the averment of a statutory cause of action in which the liability is different and greater than in an action at common law. It deprives the defendant of a valuable right, viz., the defense of the assumption of risk by the plaintiff, which is not permissible. *Kaul v. Lawrence,* 73 Pa., 410. We think it clear that the amendment to the statement of claim introduced a new and different cause of action, which was barred by the statute of limitations, and therefore, under the well-settled rule in this state, it should not have been allowed.

In support of the contention that the amendment did not change the cause of action, the learned counsel for the plaintiff claims that the language of the original statement was not changed in any way by the amendment, which, it is alleged, consisted simply of an addition to the original statement, and directed attention to the Act of Congress, and its supplement, as being applicable to the facts of the case. But, it will be observed, in the amendment there was a departure, not only from the facts as laid in the original statement, but also from the law as applicable to the facts in the original statement. In other words, there was a departure, not only from fact to fact, but from law to law. A departure in pleading may either be in the substance of the action or defense, or the law on which it is founded. 2 Saunders, Pl. & Ev. 807. The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce, or that the defendant's cars were equipped with couplers in violation of the Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. *Wabash R. Co. v. Bhymer,* 214 Ill., 579, 73 N. E., 879. It is apparent that, without this amendment, the Act of Congress could have no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff asumed the risks of dangers of his employment. If, however, all the facts necessary to bring the case within the Act of Congress had been included in the original statement, it would have been insufficient as a statement under the act without a reference to the statute. *Bolton v. Georgia P. R. Co.,* 83 Ga., 659, 10

S. E. It is also true that if, as claimed by the plaintiff,all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be change or departure from the original statement, not from fact to fact, but from law to law—from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action. *Union P. R. Co. v. Wyler,* 158 U. S., 285, 39 L. Ed. 983, 15 Sup. Ct. Rep. 877; *Boston & M. R. Co. v. Hurd,* 56 L. R. A. 193, 47 C. C. A. 615, 108 Fed. 116."

The same result was reached in the following cases:

Moleter v. Wabash R. Co. (Mo.), 168 S. W., 250.
Hughes v. N. Y., O. & W. R. Co., 143 N. Y. Supp. 603.
Finley v. Coal & Coke Ry. (W. Va.), 87 S. E., 198.

State Courts Accept the Wyler Case as Controlling and Refuse to Permit Amendments Stating a Cause of Action Under the Federal Act After the Expiration of Two Years.

This question was presented to the Missouri Court of Appeals in *Moliter v. Wabash R. Co.,* 168 S. W., 250, and in an opinion by the Presiding Judge, every authority relied upon by the plaintiff in our case is analyzed and shown to be inapplicable. It was admitted in that case that plaintiff was employed in interstate commerce by a railroad engaged in such commerce. It was also conceded that plaintiff's petition did not state a case under the Federal Employers' Liability

Act. It was insisted, however, that the evidence in plaintiff's behalf showed a case under the statute, and that thereupon that statute became applicable and excluded and superseded all laws which would otherwise have been applicable. Upon familiar authority, the Court agreed that the plaintiff's cause of action arose exclusively under the Federal statute. But the Court denied the plaintiff's right to recover under the Federal statute upon a petition which failed to allege a cause of action thereunder. On this point the Court said:

> "Plaintiff's action, as stated in his pleading, being either under the common law or the statute of Missouri, and not under the Federal statute, he cannot recover under the latter statute without changing his cause of action from law to law; and that we decided in the *McAdow v. K. C. Western Ry. Co., supra,* he could not do so. See also *Union Pacific Ry. Co. v. Wyler,* 158 U. S., 285, 15 Sup. Ct., 877, 39 L. Ed., 983; *St. L. & San Fran. Ry. v. Seale,* 229 U. S., 156, 33 Sup. Ct., 651, 57 L. Ed., 1129.
>
> Plaintiff's insistence is that, if the evidence showed his right of action was under the Federal statute, he could recover, although no facts constituting such action were pleaded, and although he did no submit the case to the jury under that statute. That idea is no less than a claim that a pleading does not bind the pleader, and indeed is unnecessary, since a recovery may be had for the violation of any right which the evidence may disclose. The authorities cited by plaintiff in no way support his position. His citation from Thornton's Federal Employers' Liability Act, Sec. 140, is the reverse of it. that author says that if, as here, the petition does not disclose that the action is based on the Federal statute, then the plaintiff is not seeking to recover on that statute, 'and the sufficiency of his pleading must be measured by the general statute law; the provisions of the

(Federal) statute not being involved.' The author adds that:

'However, if the evidence discloses the case is under the statute, there will be a fatal variance and the plaintiff must fail.'

He also cites us to *Mo., Kan. & Tex. Ry. Co. v. Wulf*, 226 U. S., 570, 33 Sup. Ct., 135, 57 L. Ed., 355. The case has no application. In that case the original petition alleged facts which constituted a good cause of action under the Employers' Liability Act, though it was averred therein that the action was brought on the statute of Kansas. An amended petition was filed in which was again averred facts which constituted a good cause of action under the Federal statute, but wherein it was alleged that the plaintiff had a cause of action by virtue of both the Kansas and the Federal statute. The railway company insisted that the amended petition set up a new and distinct cause of action. Of this the Court said:

'It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce. . . . It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the Court was presumed to be cognizant of the enactment of the Employers' Liability Act and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases, 223 U. S., 1, 53 (32 Sup. Ct., 169, 56 L. Ed., 327, 38

L. R. A. (N. S.), 441. Therefore the pleader was not required to refer to the Federal Act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.'

It will be seen from this quotation that, first and last, a cause of action was stated on the Federal statute, while in the case at bar the petition fails altogether to state a cause under that statute."

In the Moliter case, plaintiff's counsel attempted to cure by amendment, after verdict, the failure to allege a cause of action under the Federal statute, but the Court denied this right by saying:

"But it is said that, conceding the error herein pointed out, judgment should nevertheless be affirmed and the cause remanded to the end that the petition be amended to conform to the proof. We think there is no authority for such course. The defect in plaintiff's case is not a mere variance; it is a total failure to prove the cause of action alleged. 'In short, the case pleaded was not proved, and the case proved was not pleaded.' *St. L. & San. Fran. Ry. Co. v. Seale,* 229 U. S., 161. This is made manifest by the suggestion that, under plaintiff's petition, contributory negligence does not affect the measure of his damages and only goes to defeat the action, while under the Federal statute it does not defeat the action, but does affect the measure of damage."

And in the final effort to shift from the state law to the Federal law, plaintiff asked that the cause be remanded to afford an opportunity to amend his complaint. This final appeal was denied because the amendment would introduce a separate and distinct cause of action from that alleged in the original pttition. Judge Ellison says:

"It is next insisted that the judgment should not be

reversed outright, but the cause should be remanded, that plaintiff might file an amended petition setting up a cause of action on the Federal statute, and go to trial on the amended pleading. In our opinion the law in this state does not give plaintiff that right. *Hansberger v. Pac. R. R. Co.,* 43 Mo., 196; *Scovill v. Glasner,* 79 Mo., 449; *Cytron v. Transit Co.,* 205 Mo., 699, 104 S. W., 109; *Walker v. R. R.,* 193 Mo., 453, 92 S. W,. 83; *Clothing Co. v. R. R.,* 71 Mo. App., 241; *Stewart v. Vanhorne,* 91 Mo. App., 647. The proof required in a case under the Federal statute is not merely different in quantity, but it is different in character. Under that statute, the evidence musa show that the train was in use in interstate commerce, and that the plaintiff was engaged in service in such commerce, while in an ordinary action that character of evidence would be irrelevant. In an ordinary action in this state, whether statutory or at common law, as stated above, a defense exists which is not allowed in an action under the Federal statute; that is, in the ordinary action contributory negligence may be shown in total bar of the action, while in an action on the Federal statute such negligence is only in reduction of damages. So, if plaintiff should die before trial, the action would survive to different beneficiaries. In the ordinary action, to the husband or wife; and, if there be no husband or wife, then to the minor children; and, if there be none, then to the father and mother, or the survivor; then, if there be none, the action may be maintained by the administrator for the estate. While, under the Federal statute, the action is for the benefit of the widow, children, parents, proportionately, a limitation not recognized by our state statute.

N. S. R. R. Co. v. Zachary, 232 U. S., 34 Sup. Ct., 305.

St. L. & San Fran. Ry. Co. v. Seale, 229 U. S., 156, 158, 162; 33 Sup. Ct., 651; 57 L. Ed., 1129."

The case of *Hughes v. N. Y. O. & W. R. Co.,* 143 N. Y. Supp., 603, is directly in point. Summons was served January 13, 1911. Complaint was filed March 29, 1911, alleging that the plaintiff was injured April 21, 1910; that the defendant was operating a railroad in the State of New York and in the State of Pennsylvania, and at the places specified, and that at the date of the accident plaintiff "was in the employ of the defendant as a conductor upon a train which was being run by defendant along the line of its railroad near Starlight, in the State of Pennsylvaia. The cause of the accident and the statute of the State of Pennsylvania were pleaded. Plaintiff died Ftbruary 12, 1912, before tre action was tried. On October 29, 1913, plaintiff's widow qualified as administratrix and motion was made in February, 1914, to substitute the administratrix as plaintiff and permit her to serve amended complaint, basing the action upon the Federal Act. This was denied by the trial court, and on appeal the Supreme Court affirmed the order in the following language:

> "The action was not brought under that act, but is specifically based on the common law as modified by the statute of the state. An action under the Federal law must be begun within two years from the time the cause of action accrued (section 6), but after nearly three years it is sought to convert the action under the state law into an action under the Federal law, thus extending the statute by a substituted couse of action. On April 5, 1910, the Federal Act was amended so as to provide 'that any right of action given by this act to a person suffering injury shall survive,' etc. But the right cannot survive the time limited for its exercise, and when the person to whom the right is initially given elects to proceed under the law of the state, the right to proceed under the Federal statute is at least dormant, and ceasts after the expiration of two years. The Federal statute

is tendered to him who, entitled, choses to employ it. He may prefer the law of the state, as the injured person did in the present instance. But such law cannot be exploited and, upon emergency, the action be changed into one under the Federal law. There is not a suggestion of fact in the original complaint indicating intention to avail of the Federal statute."

To the same effect is *Morrison v. B. & O. R. Co.,* 40 App. Cas. D. C., 391, 396, in which the court says:

> "The original complaint herein invoked the rule of the common law as a ground of action. The attempt of the plaintiff, more than one year after the alleged bad faith of the defendant, to invoke a different rule, namely, the rule prescribed by said act of 1906, must be held to amount to the commencement of a new action. The change was one of substance, and not merely of form. *Union P. R. Co. v. Wylre,* 158 U. S., 285. It is unnecessary, therefore, to determine the effect of an excuse, seasonably pleaded, for failure to bring the suit within the statutory period."

In *Finley v. Coal and Coke Ry. Co.,* 87 S. E. 198 (decided December 17, 1915) the Supreme Court of Appeals of West Virginia, holds:

> "An amendment to a declaration by a personal representative, under the state statute giving a right of action for damages for the death of an employee occasioned by the wrongful or negligent act of the employer, setting forth a right of action under the Federal Employers' Liability Act states a new cause of action and will not be permitted."

Justice Poffenbarger, writing the opinion of the court, says:

> "Two wholly unconnected statutes imposing duties of different natures can no more constitute the basis of

> a single right of action than two unrelated contracts. The contracts come in by pleading, and the statute by judicial cognizance. This merely formal difference cannot vary the principle applicable to substantive rights."

Following tris quotation, the Wyler and Wulf cases are discussed and the latter is distinguished and the former held to be controlling.

In *Hall v. L. & N. R. Co.,* 157 Federal 464, it is held that where a widow of an employee of an interstate railroad company brought suit against such company, in a state court of Florida in her capacity as widow, to recover for the death of her husband, such action was necessarily based upon the state statute, and an amendment of her declaration changing the character in which she sued and the beneficiaries of the action introduced a new and different cause of action under the Federal Statute and was, in effect, the bringing of a new action thereunder, which was begun, for the purpose of limitation when the amendment was filed and did not relate back to the time of the commencement of the original action. District Judge Hundley says: "The question of 'relation back' of amendments is a fiction of the law, and shall never be allowed, when to do so would, to the prejudice of a litigant, deprive him of a substantial legal fight."

This case at first impression appears to be in conflict with the Wulf case, but an examination of that case will show that the plaintiff was *sole beneficiary* under the Federal and state statutes, and no question of the effect of an amendment changing the beneficiary was involved.

In *Creteau v. Chicago & N. W. Ry. Co.,* 113 Minn., 418, suit was brought under the state statute, and at the conclusion of the evidence, was submitted to the jury under the Federal Law. It was held that this was a clear departure, and judgment for plaintiff was recovered.

Points of Difference in an Action Based Upon the Common Law and the Statute of North Carolina and an Action Based Upon the Federal Employers' Liability Act.

The measure of responsibility fixed by the two acts is different.

The liability of a railroad iompany to an injured servant, in the State of North Carolina, is fired by Revisal of 1905, Sertion 2646, as follows:

> "Any servant or employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his service or employment with such company by the negligence, carelessness or incompetence of any other servant, employee or agent of the company, or by any defect in the machinery, ways or appliances of the company, shall be entitled to maintain an action against such company. Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void."

In *Seaboard Air Line Railway v. Horton,* 233 U. S., 492, the Supreme Court treats this statute as establishing a different measure of responsibility from that created by the provisions of the Federal Employers' Liability Act. By the first section of the Federal Act, a right of action is conferred for injury "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, *due to its negligence,* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equpiment." (Italics added.)

The effect of contributory negligence is different.

Under the state law, contributory negligence is an absolute bar to a plaintiff's right to recover.

Under the Federal Law, contributory negligence is not a defense, but the damages are diminished in proportion to the amount of negligence attributable to the employee.

> Seaboard Air Line Railway v. Tilgham, 237 U. S., 499.

Under the state law, contrbutory negligence is no defense whe the injury is the result of the master's violation of *any* statute enacted for the safety of the employee.

> Montgomery v. R. R., 163 N. C., 597.

Under the Federal Law, contributory negligence cannot be considered in mitigation of damages where the injury results from the violation by the master of a *Federal* statute enacted for the safety of the employee.

> Seaboard Air Line Railway v. Horton, 233 U. S., 492.

The law of assumption of risk is different.

Under the state law, assumption of risk is not a defense in an action brought against a railroad for personal injuries received. Section 2646 of the Revisal of 1905, has been construed to abolish assumption of risk as a defense in all such actions.

> Coley v. R. R., 128 N. C., 534.

Under the Federal Law, assumption of risk is a complete defense unless the employer has violated the provisions of a Federal Statute enacted for the safety of the mployee.

> Seaboard Air Line Railway v. Horton, *supra.*

Abatement of action for personal injury.

Under the state law, an action for personal injury abates upon the death of the injured employee.

Bolick v. R. R., 138 N. C., 370.

Under the Federal Law, such action survives, and may be maintained by the personal representative in addition to the action for death resulting form such injuries.

Railroad v. Craft, 237 U. S., 648.

Jurisdiction of State and Federal Courts.

An action under the state law cannot be brought in the Federal Courts unless there is diversity of citizenship.

An action under the Federal law cannot be brought by the plaintiff in the Federal Courts regardless of diversity of citizenship.

Fulgham v. R. R., 167 Fed., 660.

A suit brought in the state court, based upon the Federal statute, is subject to review by the United States Supreme Court on writ of error; a suit under the state law is not.

Removal.

An action under the state law can be removed to the proper Federal Court where there is diversity of citizenship.

Hyder v. Southern Railway, 167 N. C., 584.

An action under the Federal law cannot be removed to the Federal Court, although the plaintiff and defendant may be citizens of different states and the other jurisdictional grounds may be present.

Kansas City Southern Ry. Co. v. Leslie's Admr., 239 U. S., 559.

An action based upon this act and brought prior to the amendment of April 5, 1910, was removable to the Federal Court regardless of the citizenship of the parties under the

provisions of Section 28 of the Judicial Code. It required the following language of the amendment of April 5, 1910, to prevent such removal: "No case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." This language has been incorporated in Section 28 of the Judicial Code by an amendment effective January 1, 1912. (*The Kansas City Southern Ry. Co. v. Leslie's Admr.*, 238. U. S., 559.) An action of this character at common law or under state statutes has never been removable in the absence of diverse citizenship or local prejudice.

In *Peek v. Boston & M. R. R.*, 223 Fed. 448, motion in the United States District Court to remand to the state court was granted where the complaint stated a cause of action under the state law and the Federal Act, but also showed that at the time of the injury complained of both plaintiff and defendant were engaged in interstate commerce. This was put upon the ground that the Federal Statute controlled the liability and the right of recovery.

Measure of damages is not the same.

The measure of damages is an action based upon the common law or the statute of North Carolina is determined by the courts of North Carolina and the legislature. The court's construction of the common law rule for the measurement of damages is conclusive in the absence of legislative enactment fixing the measure of damages. The decisions of the United States Supreme Court would not be controlling on this question. On the other hand the measure of damages under the Federal Act is determined by the United States Supreme Court in the absence of a declaration by Congress on the subject.

It has recently been held by the United States Supreme Court that an attempt to apply the rule of the state court for the measurement of damages in an action under the Federal Act is error where the rule of the state court conflicts with

the measure of damages fixed by the United States Supreme Court.

Kansas City Southern Ry. v. Leslie's Admr., *supra.*

The fact that by coincidence the decisions of the State Court and the United States Supreme Court should be the same would not make the rules the same, because they are the products of different legislative and judicial systems and constantly subject to change, neither jurisdiction being subject to the control of the other.

Period within which action must be brought differs.

Under the state law, an action for personal injury may be brought within three years (Revisal of 1905, Section 395), and this is strictly a statute of limitation which must be pleaded to be available as a defense.

The two-year limitation provided by Section 6 of the Federal Act supersedes state laws limiting the period within which an action for personal injury or wrongful death may be brought.

Shannon v. Boston & M. R. R. (N. H.), 92 At., 167.

Under the Federal law, the action must be commenced within two years from the date the cause of action accrued, and this is not a mere limitation of the remedy, but is a condition upon which the right is based and the defendant is not required to plead it.

Atlantic Coast Line R. Co. v. Burnett, decided Nov. 29th, 1915.

Parties. LL

In an action under the state law plaintiff's co-employees can be joined as parties defendant.

Hough v. R. R., 144 N. C., 2692.

Under the Federal statute this cannot be done, because no provision is made by that statute, expressly or by implication, for recovery by one employee against his co-employee.

> Thompson v. Cincinnati W. O. & T. P. Ry. Co. (Ky.), 176 S. W., 1006.

The pending of an action under the state statute is no defense to an action under the Federal Act.

In *Cory v. Lake Shore & M. S. R. Co.,* 208 Fed., 847, where the complaint stated a cause of action under the Federal Act, the Court, on motion of plaintiff, struck from the answer an allegation that there was an action pending in the same court based upon the state statute upon the ground that the allegation stated no matter of defense.

The Facts Showing the Injury Sustained by Plaintiff do Not of Themselves Constitute a Cause of Action.

This position is fully sustained by the following language from *Union Pac. Ry. v. Wyler, supra:*

> "It is argued, however, that as all the facts necessary to a recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law."

> Davis v. Mfg. Co., 106 Ga., 126.
> Kansas City v. Hart, 65 Kansas, 684.

In *Box v. Railroad,* 107 Iowa, 660-666, the Supreme Court of Iowa says:

"Appellant says the cause of action is the injury wrongfully inflicted by the defendant through the negligence of the defendant. That means a cause of action based on defendant's negligence, and, if that is the meaning of the term, for the purposes of pleading, then no amendment would be vulnerable to the objection that it stated a separate cause of action, so long as the facts pleaded constituted negligence. No authority that we have seen supports such a rule."

If the Supreme Court of North Carolina has taken the correct view of this matter, then the mere statement of facts showing an injury can be amended interminably, and the expiration of the statutory period could never be a bar to the amended causes of action so long as they were based upon the original facts showing damage. It has often been held that the mere fact that causes of action grow out of the same transaction will not permit their introduction by amendment after the operation of the statute of limitations.

Van de Haar v. Van Danseler, 56 Iowa, 671-676.

"It may be that in our decisions, when speaking on the subject of amendment, the employment of the expression of *new cause of action* is calculated to produce some confusion or misapprehension. But an analysis of these cases will be sufficient to show that the expression can be taken when so used as intending nothing more than a *new right or claim* arising out of the same transaction. If it were not so, that is to say, if the new cause of action was one arising out of a wholly different transaction from that laid in the complaint, then it would constitute what we have sometimes designated as an *entirely new cause of action*, and one which could not be introduced into the complaint by amendment, if objected to. Identity of transaction is, therefore, the basis for the introduction by way of amendments of

counts on new *claims or rights* arising out of the same. If the matter sought to be introduced by amendment relates to an entirely different transaction from that laid in the complaint, it would be such a radical change as to constitute an entirely different cause of action, not allowable under our very liberal construction of the statute of amendments."

Nelson v. Bank, 139 Ala., 578, 589.

If this complaint contained merely a defective statement of a good cause of action, such defect could be taken advantage of by demurrer. (*Halstead v. Mullen,* 93 N. C., 252.) But demurrer to this complaint could not be sustained, because there is stated a good and complete cause of action at common law and under the statute of North Carolina. If demurrer had been filed, we would have been met with the statement, and properly so, that the privilege of selecting the grounds of his recovery rests with the plaintiff, and that the defendant has no right to assume that the plaintiff has failed to understand his rights and has failed to allege the facts essential to their enforcement. It was when the plaintiff's own evidence established the true condition that defendant was in position to take advantage of the failure of plaintiff's complaint to contain allegations which would be supported by his proof.

St. Louis S. F. & T. R. Co. v. Seale, 33 S. C. Rep., 651.

On demurrer the sufficiency of the complaint will be tested by the state law unless the complaint itself shows that the plaintiff was relying upon the Federal Act or that the Federal Act was applicable.

M. K. & T. R. Co. v. Neaves (Tex.), 127 S. W., 1090.

Answer to Argument That Plaintiff Had Only One Cause of Action and, Therefore, Brought Suit on the Cause of Action Based Upon the Federal Act.

The question hree presented is not what cause of action plaintiff had at the time suit was brought, but what cause of action did his complaint set up. If all pleadings should be construed to contain a statement of the cause of action which plaintiff could maintain, no amendment would be vulnerable to the objection that it introduced a new cause of action. Plaintiff's answer would be that he had only one cause of action, and in filing his complaint, he intended to rely on that cause of action, notwithstanding he makes no reference to it in his complaint. The question is not what plaintiff might have pleaded, *but what he did plead.*

If the plaintiff had pleaded the state statute, could there be any doubt that he was relying upon its provisions? Then could it be said that he had brought an action *under the Federal Act* within two years? Under well recognized principles of pleading, a complaint setting forth facts which make applicable the provisions of a public law is just as certainly an action based upon such law as if the law itself were expressly referred to in the pleading.

In *Union Pac. Ry. Co. v. Wyler,* 158 U. S., 285, the fact that Wyler had no cause of action at common law and that his sole right to recover arose under the Kansas statute was not regarded as controlling by the Supreme Court. Wyler said he had a good cause of action at common law, just as Renn said that he had a good cause of action at common law and under the statute of North Carolina. It is too late, we submit, for Renn, as it was held to be for Wyler, to allege facts establishing a different cause of action after such cause of action has ceased to exist.

In *Pactillo v. Allen-West Commission Co.,* 131 Fed., 680, it is said that:

> "An amendment, which introduces a new or different cause of action and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction and by the practice of the state, a plaintiff is required only to state the facts which constitute his cause of action."

This is a statement of the general rule. The new or different cause of action referred to does not mean that it must be different from the cause of action which actually exists in favor of the plaintiff, but if it is *different from the cause of action pleaded by plaintiff in the original complaint,* it is obnoxious to the rule. It matters not that plaintiff has pleaded a cause of action which does not exist. He is still precluded from amending the complaint so as to plead the cause of action which actually existed where it differs from the cause of action actually pleaded.

Again, we submit that the complaint states a cause of action under the common law and the state statute or it states no cause of action. It is certain that it does not state a cause of action under the Federal statute. It is attempted by the amendment to make it state a cause of action under the Federal statute after such cause of action has ceased to exist.

Would it have been permissible for plaintiff to have shown by his evidence over defendant's objection that he was employed in interstate commerce without amending his complaint? The evidence would have been excluded, we submit, upon the ground that it was irrelevant to the cause of action pleaded in the complaint, and in order for plaintiff to have overcome the defendant's objection, his complaint would have had to be amended.

Another answer to the plaintiff's argument will appear by

considering that a cause of action at common law and under the state statute did exist if the facts were as plaintiff alleged them, and if defendant had admitted these facts, and set up no others, the action would have been tried to a conclusion under the state law.

Fleming v. R. R., 160 N. C., 196.

While plaintiff from the outset might have had a cause of action under the Federal statute, he did not undertake to assert it until it was brought to his attenion by the defendant more than two years after it accrued.

In *Molier v. Wabash R. R. Co.,* 168 S. W., 250, the argument that plaintiff had only one cause of action, and therefore brought suit on that cause of action, is met in the following language:

> "Plaintiff's insistence is that, if the evidence showed his right of action was under the Federal statute, he could recover although no facts constituting such action were pleaded, and although he did not submit the case to the jury under that statute. That idea is no less than a claim that a pleading does not bind the pleader, and indeed is unnecessary, since a recovery may be had for the violation of any right which the evidence may disclose. The authorities cited by plaintiff in no way support his position."

The dissenting opinion of Mr. Justice Brown of the Supreme Court of North Carolina in the present case contained in answer to this position of plaintiff which seems to show the fallacy of the argument in support of such position.

There is Not Sufficient Evidence of Negligence in This Case to be Submitted to the Jury.

At the conclusion of the evidence defendant moved for judgment of nonsuit, which, under the North Carolina practice, raises the question of the sufficiency of the

evidence as matter of law to be submitted to the jury (exception No. 17, record, page 86). Defendant also requested the trial court to instruct the jury to answer the first issue, which related to negligence, "No." This instruction was refused, and defendant excepted. (Exception No. 18, record, page 86.)

> "A railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track even in the neighborhood of depot platforms; and a brakeman who is injured in consequence of slipping on it has no remedy against the company."
>
> Piquegno v. R. R., 52 Mich., 40.

As was said in this case, if it was the duty of the defendant to keep snow and ice off the path leading from the tank to the pump, it was its duty to keep it off every path at every point on its right of way. It seems to us to make no difference how the water got on the path, whether through nature or from the overflow of the tank, if the defendant owed the plaintiff no duty to keep the path free from ice, there was no breach of duty in this case.

There is no evidence that the path being used by the plaintiff was marked out by the defendant as the path for its employees. Plaintiff's witnesses said it was the usual path. They also said that employees were free to go any way they desired in getting to the pump, and the evidence shows that there were two additional paths. There is nothing to show that the defendant had ever adopted the path or designated it as the proper one for its employees; there is nothing to show that the defendant marked it out or kept it up. It may have been, and probably was, if a path at all, one of the several ways of getting to the pump. The tank and pump were both in the open country with nothing to prevent pedestrians using any path they saw fit, or walking in any direction they desired. Plaintiff says he was walking in the usual path from the pump to the train. (Record, page 17.) On page 25 of

the record, plaintiff testifies that there was another path that comes up to the side of the tank towards Richmond. That path was on the opposite side of the tank from that on which plaintiff fell.

Parks, plaintiff's witness, explains on page 32 of the record that you can go to the pump house any way you want to go. He also explains the other paths leading to the pump house.

On page 33, this witness says that he looked after things the best he could around the tank. "That was a hard winter. Everything was frozen up. . . . That was the hardest winter I had ever seen around Cochran."

We submit that the defendant owed the plaintiff no duty to prevent its water tank from overflowing and that the evidence is insufficient to show negligence on the part of the defendant.

> "The duty of a master to provide a reasonably safe place in which his servant shall work does not extend to safeguarding the route of every journey the servant may be required to make in fetching and carrying whether messages or portable articles."
>
> Bride Co. v. Bainum, 146 Fed. Rep., 367.

The defendant had no notice that plaintiff would use that path. If it was dangerous to use, plaintiff had equal opportunity with defendant to know the danger. Plaintiff had his choice of the paths leading to the pump. He was free to go where he pleased. That he selected the path in which the ice had accumulated during the day ought not to be charged against the defendant.

Again, we submit that the evidence does not show that the defendant had notice of the accumulation of the ice. The section foreman says he knew it, but he is not such officer as will charge the company with notice. And it does not appear that the defendant could have cleaned off the path and

kept it clean until after the plaintiff passed over it. The evidence shows that the ice and snow would thaw in the day and freeze again at night.

Plaintiff Assumed the Risk of Injury From Slipping on Ice Around a Water Tank.

This question is raised by the motion for judgment of nonsuit (exception No. 17, record, page 86), and by refusal of the trial court to give defendant's request for instructions that upon all the evidence plaintiff assumed the risk (exception No. 19, record, pages 86-87).

The contention of the defendant on the issue of assumption of risk is that the condition complained of was one of the ordinary risks of an employee engaged in working around water tanks. Any man of ordinary intelligence is charged with knowledge of the fact that in extremely cold weather there is an accumulation of ice around water tanks, and plaintiff admitted that he was well aware of that condition.

Plaintiff testified that, "You find water around the water tanks, but it is on account of the carelessness of the firemen. You find it. I do not know about a plenty of it. I have been to tanks and found water around them, and that is a common thing, but it is not necessary that it should be there but I have seen it there. In cold weather that water freezes like any other water. In weather as cold as this, water that comes down out of the heavens freezes as soon as it hits the ground. I had just gotten to Cochran, had not been there over 30 minutes. I found ice there at that tank. I do not know that I found ice anywhere else that winter." (Record, page 25.)

Railroad employees assume the risks incident to the falling of snow and forming of ice on and the removal of the same from the tracks and places where employees are required to

work, if such removal is made in a proper and reasonable manner.

> Labatt on Master and Servant (1st Ed.), p. 604 (note).

A servant is deemed to have notice of all risks which, to a person of his experience are or ought to be open and obvious.

> Labatt on Master and Servant (1st Ed.), Sec. 39.

It is presumed that even an inexperienced servant can appreciate the danger of losing his footing on an icy surface.

> Labatt on Master and Servant (1st Ed.), page 1098 (note j).

Mr. Labatt says, at page 1045 (1st Ed.):

> "All servants are presumed to be acquainted to some extent with the properties of matter and the operations of the laws to which it is subject. To this generic conception are referable the decisions which proceed upon the hypothesis that a servant is, in some degree at least, bound to take notice of the dangers arising from slippery surfaces, from the action of extreme cold," etc.

Again it is said on page 1044, just preceding the foregoing quotation that:

> "The law supposes every adult to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate any obvious danger. The master, therefore, has a right to assume that an adult possesses 'that knowledge which is acquired by common experience'; that he knows everything which is 'a matter of common knowledge or presumed to be within the common experience of all men of common education;' that

he understands those dangers which are the subject of common knowledge, or can be readily seen by common observation."

Exception No. 1, Record, Page 18.

The plaintiff was permitted to testify over the defendant's objection as follows:

Q. Did you cause your own fall in any way?

A. No, I did not. I was just as careful walking as I could be.

We submit that it was clearly erroneous to permit the plaintiff to testify whether he caused his own fall. This was a question for the jury to determine upon all of the evidence. As direct authority in support of this exception, we refer to *Summerlin v. Railroad,* 133 N. C., 551, in which it was held that it would be error to permit an expert to testify that a certain injury was caused by a fall from a car. We also rely upon *Phifer v. Railroad,* 122 N. C., 940, in which the Court held that it was error to permit the plaintiff to testify that he was careful while at work in building a trestle on the defendant's track. The case of *Raynor v. Railroad,* 129 N. C., 195, is also in point in support of the defendant's objection to this testimony.

It was permissible for the plaintiff to testify fully as to what he did, the conditions surrounding him, and the manner in which he was walking, that is, he could describe all of the circumstances of his fall, and it was the exclusive province of the jury to determine whether the fall was caused by his conduct or by the negligence of the defendant. The cause of an injury is a question for the jury and is not a proper subject for opinion evidence. The harmful effect of this testimony seems to us to be quite manifest. The defendant contended upon the second issue that the plaintiff was guilty of contributory negligence, and that his fall was caused by his walking hurriedly over snow and ice in order to reach a train which was about to leave the station. By the evidence ad-

mitted the plaintiff was permitted to say that what he did did not in any way cause his fall, and that he was just as careful walking as he could be. We submit that this was harmful error for which the defendant is entitled to a new trial.

Jeffreys v. Railroad, 129 N. C., 236.

Exception No. 7, Record, Page 30

The plaintiff's witness, Parks, had been permitted to testify that the water tank was running over during the day on which plaintiff sustained his injuries. He was then asked the question, why was the tank running over. To this question the defendant objected. Objection was overruled and defendant excepted. The Court then asked the witness if he knew why the tank was running over, and he answered, yes, because the pumper was neglecting his duty and let it run after the tank was full. It appears in the record that the defendant asked that this answer be stricken out and the stenographer added as an additional ground for exception the following: "as there is no allegation of such negligence in the complaint." The defendant's request that the evidence be stricken out was general, and as an additional ground it was suggested that there was no allegation of such negligence in the complaint. An examination of the complaint will show that it is nowhere alleged that there was any negligence on the part of the defendant's pumper. In fact, there is no suggestion in the complaint that the pump was in any manner involved in this accident. But aside from this fact, the defendant contends that it was clearly erroneous to permit the plaintiff's witness to say that the tank was running over because *the pumper was neglicting his duty.* It has been uniformly held that it is for the jury to say whether certain conduct constitutes negligence, and that a witness will not be permitted to express an opinion as to whether certain facts establish or do not establish negligence. In *Phifer v. Railroad,* 122 N. C., 940, the plaintiff was per-

mitted to testify that he was *careful* while he was at work in building a trestle on defendant's track, and it was held that this evidence was incompetent. We refer the Court to the opinion in this case as an authority directly in support of Exception No. 7, and we call attention particularly to the language of Mr. Justice Montgomery at page 941.

The Phifer case is cited with approval in *Raynor v. R. R.*, 129 N. C., 195, in which it is held that the Court properly refused to permit a witness to testify whether any more force was used by the officials of the railroad than was necessary in ejecting the plaintiff from the train. The Court says that this was a matter of fact to be determined by the jury, and could not be established by the opinion of the witness, and that to have answered it the witness would have to find the facts constituting the force actually used and draw his conclusion from them.

It will be observed that the witness Parks did not qualify as an expert on the matters relating to pumpers and water tanks, and even if he had so qualified, this would not have cured the error in permitting him to express the opinion that the pumper was neglecting his duty. It is generally held that an expert must not be permitted to usurp the province of the Court and the jury by drawing those conclusions of law or fact upon which the decision of the case depends.

Summerlin v. Railroad, 133 N. C., 551.

In Jones on Evidence (2nd Ed.), Section 372, the author says:

> "Although this view has been earnestly criticised, it is sustained by the undoubted weight of authority, and any lawyer who has had large participation in the actual trial of cases will understand that in many cases trials would become a mere farce if zealous experts were allowed to directly express their opinions upon the very

issue ti be tried." In the note that is appended to Sec. 372 of Jones on Evidence (2nd Ed.), will be found numerous cases sustaining the author's views.

The force of this evidence and its effect upon the result of the case will be seen by referring to that part of the Judge's charge covered by defendant's exception No. 28, beginning on page 95 of the record as follows:

> "The plaintiff contends that this accumulation of ice was caused, not by the general weather conditions that prevail, but in a large part, if not entirely, by failure of the pumper to so regulate the pumping of the water as to keep it from running out of the tank, and that by failure to exercise proper care he had caused the tank to overflow and that the water had fallen down around it and had frozen, and that near the tank and around it on all sides of it the ice was three feet deep and extended out into the parth."

The Court then instructed the jury that if the evidence satisfied them of the truth of the plaintiff's contentions as recited by the Court, they would answer the issue of negligence Yes. (Exception 29, Record, page 96.)

Exception No. 24, Record, Page 92.

This exception will be considered together with exceptions Nos. 25, 26 and 27, record, pages 93 and 95, which relate to the same matter.

The Court instructed the jury:

> "The extent of its duty to its employee is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed may be safe for the workmen."

Here the Court instructs the jury that the defendant owed the plaintiff the duty to exercise ordinary care to furnish him

a *safe place.* How safe is left to the jury without qualification. The path may have been reasonably safe under the circumstances. If so, the defendant had performed its duty, and there was no liability. Following this instruction the trial judge says: "Now the plaintiff alleges that *that was the duty of the defendant with reference to this path,* and that its failure to perform it constituted negligence." (Italics added.) Then the principle of law announced is applied to the facts of the case as follows:

> "If the evidence satisfies you by its greater weight that the defendant failed in the performance of this duty, and by reason of such failure permitted ice to accumulate upon a path which was the usual path traveled by its employees to and from the pump house to the track, and by reason of such failure, and as a proximate cause thereof, the plaintiff slipped and fell and injured himself, then your answer to this first issue would be 'Yes'; unless you are so satisfied, your answer to it would be 'No.'"
>
> "Now, the plaintiff contends that there was no reason why in the exercise of ordinary care the defendant might not have made that place *safe* for the movement of its employees; that it is in testimony that they cut the ice away in approaching the depot a short distance off, so that people having business with the agent, or passengers taking or leaving the train, could get away from the depot in the open place from which the ice had been cut; that the defendant had present that day a section force which could have been utilized to open this path and cut the ice away; that it had employees there connected with the work train, which had been there for some time during that evening that could have been utilized for the purpose of opening this path and removing the ice, which the plaintiff alleges had accumulated there, and it failed to exercise the care, reasonable

care and prudence which I have told you it was its duty to exercise in order to make a safe place for its employees at that time along that path."

The duty of the master to the servant with respect to the safety of the place to work has been fully considered by our Court in the recentt case of *Steele v. Grant,* 166 N. C., at page 641, in which Mr. Justice Walker summarizes the rule as follows:

> "The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adepuate machinery and apparatus to the servant, *with a reasonably safe place* and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to tthe servant against injury."
>
> "It is universally held that at this day that it is the master's duty to furnish his servant *reasonably* safe machinery. If he fails to do so he exposes the servant to extraordinary risks and hazards. . . . *The failure to exercise due care* in furnishing such machoinery is a breach of duty which the master owes the servant."
>
> Moore v. R. R., 141 N. C., 111.

In the case of *Gardner v. Railroad,* 150 U. S., at page 359, cited by Mr. Justice Walker in *Steele v. Grant, supra,* the United States Supreme Court says:

> "The master is not to be held as guaranteeing or warranting the absolute safety under all circumstances or the perfection of the machinery or apparatus which may be provided for the use of employees, but he is bound to exercise the care which the exigency reasonably demands in furnishing such as is adequate and suitable, and in keeping and maintaining them i such condition as to be reasonably safe for use."

In the case of *B. & O. Railroad v. Baugh,* 149 U. S., 387, cited in *Steele v. Grant,* Mr. Justice Brewer says:

> "In the case of *Atchison, Topeka, etc., R. R. v. Moore,* 29 Kansas, 632, 644, Mr. Justice Valentine, speaking for the Court, thus succinctly summed up the law in these respects: 'A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to worth with him; and when the master has properly discvharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and employees.' "

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its emplpy."

Railroad v. McDade, 191 U. S., 64.

For a very full discussion of this question see *Powell v. American Sheet & Tin Plate Co.,* 216 Pa., 618.

Exception No. 32, Record, Page 104.

On the measure of damages the Court, over the objection and exception of the defendant, instructed the jury as follows:

> "The plaintiff is entitled to recover as damages, if entitled to recover at all, one compensation for all in-

juries resulting from the defendant's negligent conduct. This damage embraces indemnity for loss of time, inability to perform labor or capacity to earn money, for injuries suffered by body or mind, which are the immediate and necessary consequences of the injury sustained. The plaintiff is to have a reasonable compensation for loss of bodily powers, actual suffering of mind or body, and also from any expense reasonably necessary which you find he may have incurred as a result of the injury sustained, which injury you find is the immediate necessary consequence of the defendant's negligent conduct, if it was negligent, to recover as damages one compensation for all loss which you find by the greater weight of the evidence the plaintiff has sustained in consequence of defendant's negligence. (Exception No. 32. Record, page 104.)

This instruction permits the jury to assess double damages, that is, *for loss of time and inability to perform labor or capacity to earn money.*

Exception No. 33, Record, Page 107.

The trial Court instructed the jury:

"In the nature of things, it is impossible for the law to lay down any definite rule, but it says to the jury that they should award a reasonable compensation, with the emphasis on the word 'reasonable.' He is to be compensated for all that he has suffered, if you find that he has suffered, but it ought not to be exaggerated on account of any sympathy you may have with him, but it ought to be reasonable, based upon the evidence, and you may use your common sense and your common observation of men, and what suffering, that you may have had yourselves in order to enable you to determine what would be a reasonable compensation for

> such pain and suffering as he sustained as the direct and immediate consequence of this injury, if you find that such pain and suffering were the direct and immediate results of the negligent conduct of the defendant."

(This is defendant's exception No. 33. Record, page 107.)

We earnestly insist that this charge is erroneous. It contains the statement that the law lays down no definite rule for measuring damages, and then permits the jury to consider any suffering that they may have had themselves in order to determine what would be a reasonable compensation. This permits the jury to go far afield and determine the issue of damages upon other considerations than the evidence in the case. Juries should act on the evidence and not o their personal feelings.

A similar instruction was given by the trial Court in *Shepard v. Telegraph Co.,* 143 N. C., at page 246, and the Supreme Court of North Carolina held it to be erroneous. Chief Justice Clark says:

> "Nor can we approve his Honor's instruction that the jury had 'a right to take into consideration their own feelings.' If this was correct, damages would depend, not upon evidence, but the difference in the feelings of the individuals composing a jury. A jury has no right to do more than give the plaintiff a fair recompense for the anguish he suffered from the negligence of the defendant, the amount to be determined, not by their own feelings, but by the evidence."
>
> Shepard v. Telegraph Co., 143 N. C., at page 246.

An instruction which permitted the jury to consider matters extraneous to the record was condemned in *Norfolk & W. R. Co. v. Holbrook,* 235 U. S., 625.

Formal Exceptions.

The following formal exceptions upon which the defendant relies, are fully covered by the foregoing argument:

For that the court overruled defendant's motion for judgment on obstante veredicto, upon the coming in of the verdict.

This is defendant's exception No. 36. (Record, page 113.)

For that the court overruled the defendant's motion to set the verdict aside because the amount of damages awarded is excessive.

This is defendant's exception No. 37. (Record, page 113.)

For that the court overruled the defendant's motion to set the verdict aside as against the weight of evidence.

This is defendant's exception No. 38. (Record, page 113.)

For that the court overruled defendant's motion for a new trial for errors occurring during the trial and errors in the admission and exclusion of evidence, and in the court's charge to the jury, and in permitting plaintiff to amend his complaint so as to bring his cause of action within the provisions of the act of Congress of April 22, 1908, known as the Federal Employers' Liability Act, and in refusing defendant's motions for judgment of nonsuit and to dismiss the action.

This is defendant's exception No. 39. (Record, page 113.)

For that the court signed judgment as appears in the record.

This is defendant's exception No. 40. (Record, page 115.)

Conclusion.

In conclusion, the plaintiff in error refers the Court to the dissenting opinion of Associate Justice Brown, of the Supreme Court of North Carolina ,which is concurred in by Associate Justice Walker, as containing a very exhaustive discussion of the questions involved in this case. The conclusion is reached by Mr. Justice Brown that the judgment should be reversed upon three grounds: First, the cause of

action set forth in the amended complaint cannot be maintained because it is asserted for the first time after the expiration of more than two years from the time the cause of action accrued; second, the evidence is insufficient to go to the jury upon the question of the negligence of the plaintiff in error, and, third, the evidence establishes as a matter of law that the plaintiff assumed the risk.

For the errors which we have attempted to point out and establish by argument and the authorities, we ask that the judgment of the Supreme Court of North Carolina be reversed.

Respectfully submitted,

MURRAY ALLEN,

Attorney for Plaintiff in Error.

Raleigh, N. C., Feb. 19, 1916.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

SEABOARD AIR LINE RAILWAY,
Plaintiff in Error,
v.
J. T. RENN,
Defendant in Error.

No. 773

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

MOTION ON BEHALF OF J. T. RENN, DEFENDANT IN ERROR, TO DISMISS THE WRIT OF ERROR OR AFFIRM THE OPINION AND JUDGMENT RENDERED BY THE SUPREME COURT OF NORTH CAROLINA; AND, IF THE COURT SHOULD DESIRE TO HEAR ARGUMENT, TO TRANSFER SAID CAUSE TO THE SUMMARY DOCKET.

Comes now the defendant in Error, J. T. Renn, by his counsel, William C. Douglass, Clyde A. Douglass, and Robert N. Simms, appearing in his behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction upon the grounds hereinafter set forth in the brief filed herewith.

The Defendant in Error further moves the Court to affirm the opinion and judgment rendered by the Supreme Court of North Carolina, upon the ground that it is manifest that the writ of error was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument. If the Court should desire to hear argument, then the Defendant in Error further moves the Court to order this cause transferred to the summary docket provided for by this Court in an amendment to Rule 6, as the case is of such a character as not to justify extended argument.

The grounds of these motions, the statement of the case, facts and argument are more fully set forth in the briefs accompanying the motions, all of which is herewith submitted.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
ROBERT N. SIMMS,
Counsel for Defendant in Error.

Notice to Seaboard Air Line Railway.

To Seaboard Air Line Railway, Plaintiff in Error:

Please take notice that on the .... day of February, 1916, at the opening of the court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Attached hereto are copies of the motions to dismiss and affirm, the briefs and arguments to be submitted in support thereof; and also the motion to transfer this cause to the summary docket, if the Court should desire to hear argument thereon.

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLAS,
ROBERT N. SIMMS,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

October Term, 1915.

SEABOARD AIR LINE RAILWAY, Plaintiff in Error, *v.* J. T. RENN, Defendant in Error.	No. 773

DEFENDANT IN ERROR'S BRIEFS ON MOTIONS TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION, AND TO AFFIRM THE JUDGMENT OF THE STATE COURT.

In this case the defendant in error contends that the plaintiff in error has been denied no right, privilege or immunity under the Federal Employers' Liability Act of Congress, under which it was tried, and that there was no Federal question involved in the trial in the courts below, and that the case should be dismissed for want of jurisdiction.

The allowance by the trial Judge of the amendment to the defendant in error's complaint does not, as we contend, present a Federal question, but involves only a question of practice and procedure in the State courts, which is not reviewable by this Court.

The matters in controversy in this case were questions of

fact, and were properly submitted to the jury under correct instructions by the trial Judge, and the judgment should be affirmed.

Upon a thorough examination of the record in this case it will appear to the Court that the writ of error was taken for delay only, and that the questions upon which the decision of the cause depend are so frivolous as not to need further argument. If, however, the Court should conclude that there are Federal questions to be determined upon the writ of error in this case, and that this Court has jurisdiction of this case, and that the questions upon which the decision of the cause depend are not frivolous, and the Court should desire to hear further argument herein, then the defendant in error moves the Court to order this case transferred to the summary docket provided for by this Court in an amendment to Rule 6, as the case is of such a character as not to justify extended argument.

BRIEF OF DEFENDANT IN ERROR ON MERITS.

STATEMENT OF CASE.

This was a civil action for personal injuries, tried before a jury in the Superior Court of Wake County, North Carolina, at the June Term, 1915, and heard on appeal in the Supreme Court of North Carolina at the Fall Term, 1915. The judgment of the said Superior Court awarding the defendant in error $3,500 was affirmed and the cause brought to this Court, upon writ of error, by plaintiff in error.

The defendant in error was a resident of the city of Raleigh, N. C., and in the employment of the plaintiff in error as repairer of its pumps between Raleigh, N. C., and Richmond, Va., and in the course of his employment was

ordered by the plaintiff in error to go, as he did, from Raleigh, N. C., to Cochran, Va., to repair one of the pumps used by the plaintiff in error in connection with its line of railroad from Raleigh to Richmond. He arrived at Cochran after dark. The station building there is on the west side of the track. Across the track to the east there is a water tank which was used to supply water to engines of the plaintiff in error operating between Richmond and Raleigh. The ground upon which the foundation of the tank is built is a couple of feet or more lower than the track. Southwardly from the tank is a tool house which is about 20 feet from the tank. About 500 feet northwardly from the tank and located in a depression is the pump house. Water was pumped from a pool beside the pump up to the tank. The railroad beside the pump house was on a fill some 22 feet high. There was a path or way leading directly down from the track to the pump house, but this was quite steep. There was another path leading from the pump house southwardly, parallel with the railroad track and up the incline and around behind the tank, then between it and the tool house and up to the railroad track and across to the station. This was the usual path used by pedestrians in going back and forth between the station grounds and the pump, and the defendant in error was in this path when he fell.

Upon his arrival that night the defendant in error left the train on the western side, went around the engine and down to the pump. He then discovered that, to make the repair, he would need a 4-inch flange union, and he recalled that the company had one at Skelton, Va. Meanwhile a work train of the plaintiff in error was standing on the track beside the station and about to leave (southbound) for Skelton, Va., and Norlina, North Carolina. The plaintiff, in company with the pumper, Lewis, and the section foreman, Parks, in charge of that section, left the pump house for the purpose of boarding the said train and going for said flange union. The pumper led the way, carrying in his hand a lighted lantern, the plain-

tiff following a few feet after him, and the section foreman, Parks, following a few steps behind the plaintiff. They traversed the above mentioned usual path and were still in the same and within a few feet of the railroad track when the defendant in error fell. The path up to that point had been rough and the footing secure. The weather had been cold for some time and there had been snow on the ground, which had partly melted during the days and froze again during the nights after being tracked, and hence was roughened. During the day of the night on which defendant in error's injury occurred the plaintiff in error's pumper had negligently and carelessly allowed the pump to run long after the tank was filled with water and caused the tank to overflow for several hours, and this water which had overflowed had spread and frozen upon the ground and pathway aforesaid at the place where the plaintiff fell, leaving a smooth, slick surface, highly dangerous for the use of pedestrians. Snow had been falling for an hour or two before defendant in error's fall, and this had covered the smooth ice, and hence defendant in error could not see it, and knew nothing of the dangerous condition of said walkway and the presence of the ice. He testified that he did not know it was there and could not discover it by the use of his sight, and that he had never seen ice there before; and it was proven by witnesses that the plaintiff in error had never permitted the formation and accumulation of ice there before. Defendant in error testified that he was walking in a careful manner, watching his footsteps by the aid of the lantern in front of him. Neither the pumper nor the section foreman, Parks, had in any way warned him of the dangerous condition of said pathway. Parks knew it existed. He had been present at the station all during the day and had seen the water overflowing for a long time and freezing, as aforesaid. Parks had there present all during the day a section force of eight men, and only three of them had been occupied during the day. Moreover, the work train had been at that station for several hours with its crew of hands, and yet none of them

had removed the ice or roughened it, or placed any sand, dirt, ashes, cinders sawdust or other substance upon it to make the footing safe, although the ice covered at that point the usual path for approaching the train from that side of the station. In falling the defendant in error's right shoulder struck violently and he was injured in his shoulder and arm and hip and elsewhere. He got up and with assistance boarded the work train, went to Skelton, secured the needed flange union, proceeded to Norlina, North Carolina, in order to catch the next train back to Cochran, which he did, and with assistance caused the pump to be repaired.

At the conclusion of the defendant in error's evidence the plaintiff in error moved for a judgment of nonsuit. The defendant in error, in deference to the opinion of his Honor, amended his complaint, as appears in the record, and the plaintiff in error amended its answer, as appears therein, and the motion for nonsuit was denied.

ARGUMENT.

The plaintiff in error contended that the original complaint did not set up a cause of action under the Federal Employer's Liability Act, and claimed that the defendant in error was employed in interstate commerce and the plaintiff in error was engaged therein at the time of his injury, and further contended that the amendment to the complaint set up a new cause of action under said act, and that this cause of action was barred by the two years' statute of limitations contained in said act.

Only One Cause of Action Existed.

The defendant in error contends that there existed only one cause of action, to wit, the one stated in the original complaint, and the facts relating to which were amplified in the

amendment. It is well established that where an interstate employee suffers injury while engaged in such commerce there arises and exists in his behalf but one cause of action, to wit, the action under the Federal Act. This is exclusive, and since the passage of said act the plaintiff has no other cause. The citation of authorities to support this proposition is hardly necessary. But see *Wabash R. Co. v. Hayes,* 234 U. S., 86; 58 L. Ed., 1226, at page 1230. An interesting note may also there be found, citing cases to the effect that even if the action was brought under the Federal Act, and the proof demonstrates that there is no cause of action under that statute, the action will not be dismissed if the plaintiff has made out a good cause of action at common law.

No Reference to Act Necessary.

Defendant in error was not required to plead or even refer to the said act. *Fleming v. Railroad Co.,* 160 N. C., 196; *Railroad Co. v. Wulf,* 57 L. Ed. (U. S.), 355; *S. A. L. Ry. v. Duval,* 56 Law Ed. (U. S.), 1171. It is only required that the plaintiff shall set forth in his complaint a plain and concise statement of the facts constituting his cause of action. Revisal of 1905 of North Carolina, section 467. The Federal statute makes similar provision.

Original Complaint Sufficient.

The defendant in error contends that his original complaint contains sufficient allegations under the Federal Act. *Duval v. Railroad,* 56 L. Ed. (U. S.), 1171. It is true it does not, in so many words, allege that the plaintiff in error was engaged in interstate commerce; but, liberally construing its allegations, as our statute requires, it can only mean that the plaintiff in error was engaged in operating an interstate line of railroad, and that the defendant in error was injured while employed by it in such work, he being a resident of Raleigh,

N. C., and hurt in Virginia. The pump upon which he was working was admittedly "an instrumentality in interstate commerce." If the defendant in error was engaged in repairing such an instrumentality, then he was engaged in interstate commerce. It is not necessary that the complaint should, in so many words, allege that the plaintiff in error was engaged in interstate commerce or that the defendant in error was employed in interstate commerce. Such allegations would not have been statements of *fact,* but only *conclusions of law.* What constitutes interstate commerce is a question of law, and the defendant in error was not required to plead conclusions of law.

By analogy, the Supreme Court of North Carolina has held in the case of *Webb v. Hicks,* 116 N. C., at p. 605, that an allegation "that the defendant is indebted to the plaintiff and that the debt has not been paid" "merely states a conclusion of law."

The original complaint needed no elimination; it was not necessary to strike out a single sentence or line therefrom to render it admittedly sufficient under the Federal Act.

The defendant in error suffered only one injury at the time and place stated, and the plaintiff in error was familiar with the facts relating thereto and answered the said complaint without request for further particulars, and came to trial fully prepared, with all the witnesses having knowledge of the facts relating thereto, as appears from the testimony itself.

If Complaint was Insufficient it was Only a Defective Statement of a Good Cause.

At most, therefore, if the original complaint was insufficient, it was only an uncertain and indefinite statement of one of the facts constituting a cause of action. But, indeed, if it was more than this, it was not any more than a defective statement of a good cause of action. This necessarily follows from the fact that there existed, and could exist since the

Federal Act, only one cause of action arising out of the facts which occurred, and, therefore, if the defendant in error alleged any cause of action arising therefrom, it was the sole and exclusive cause of action existing under the Federal Act, and if his statement was not sufficient it was simply a defective statement of a good cause.

> The Supreme Court of North Carolina has held that "If the pleading was not sufficiently definite or certain to enable the defendant to understand the precise nature of the allegation, it could, by motion, have obtained an order from the Court requiring the plaintiff to make it definite and certain by amendment; but this cannot be done by demurrer, as it is not the statement of a defective cause of action or the defective statement of a good cause of action, but, at most, only an uncertain and indefinite statement of one of the facts constituting a cause of action. *Allen v. Railroad,* 120 N. C., 548." *Railroad v. Main,* 132 N. C., at page 452.

The defendant in error's statement in his original complaint was so good and sufficient that the plaintiff in error did not ask for further particulars.

Pleadings Liberally Construed and Amendments Favored.

The policy of the Courts, both State and Federal, as declared in the statutes and in many decisions, is to liberally construe pleadings and to liberally allow amendments. Revisal of 1905 of North Carolina, sections 495, 507, *et passim;* 4 Federal Statutes Annotated, section 954.

THE ALLOWANCE OF AMENDMENT INVOLVED ONLY A QUESTION OF LOCAL PRACTICE, AND PRESENTS NO FEDERAL QUESTION.

The allowance of the amendment involved only a question of pleading and practice under the local laws, and these matters are left by the Federal Supreme Court to the determina-

tion of the State courts. *Brinkmeier v. M. P. R. Co.*, 224 U. S., 268 (56 L. Ed., U. S., 758); *Railroad v. Hayes*, 58 L. Ed. (U. S.), 1226; *Central Vermont R. R. Co. v. White*, U. S. Supreme Court Advance Opinions, August 1, 1915, page 865.

The plaintiff in error relies strongly upon the case of *Railroad v. Wyler*, 158 U. S., 285 (39 L. Ed., 983), but that case is easily distinguishable from the case at bar.

In that case there existed two separate and distinct causes of action, one under the common law and the other under the Kansas statute. The plaintiff in that case sued in the Missouri Court under the common law, and he sought to amend and convert his action into a suit in the same court under the Kansas statute. It was necessary to specially plead the Kansas statute to avail himself of its benefits. The Court very properly held that this was a departure, and that the proposed amendment set forth a new cause of action, and that the statute of limitations was available to defendant. But in the case at bar two causes of action cannot arise out of the state of facts which existed. The act of Congress was exclusive of all other rights, and they were wiped out of existence by the creation, by this enactment, of the right under the Federal Act. The only cause of action which existed in the case at bar was the one arising and existing under the Federal Act, upon the actionable negligence relied upon from the beginning. The Wyler case is distinguished by the Supreme Court of the United States itself in the Wulf case, 57 L. Ed., at page 364.

It is, of course, fundamental that if the amendment did not state a new cause of action its allowance was in the discretion of the Court, and the plea of the statute of limitations was not available against it, the original complaint having been filed and the action commenced before the bar of the statute. It is also fundamental that when an amendment is properly allowed it is operative and construed as if it had

been made at the commencement of the action. Numerous authorities upon these propositions are cited in the notes in the 39th Law Edition (U. S.), page 983.

See also:

Wynne v. Liverpool, 71 N. C., 121.
Ely v. Early, 94 N. C., 1.
Whalen v. Gordon, 37 C. C. A., 70.
Woodcock v. Bostic, 128 N. C., 243.

The defendant in error relies upon the case of *M. K. and T. R. R. Co. v. Wulf,* 57 L. Ed. (U. S.), 355. There it is held that the Federal Courts are presumed to be cognizant of the Employer's Liability Act of April 22, 1908, without any reference thereto in the pleadings, and to know that in respect to the responsibility of interstate carriers by railroads to their employees injured in said commerce after its enactment, it had the effect of superseding State laws upon the subject. It is also held that a reference to a State statute in the petition in an action which can legally rest only upon the Federal Employer's Liability Act will not invalidate the pleading any more than the mention of any other repealed statute. It is further held that the trial court, in the exercise of its authority under section 954, U. S. Revised Statutes, might allow an amendment to the petition in an action brought by the sole surviving parent in her individual capacity by which for the first time she sets up the right to sue as a personal representative, in which latter capacity alone could her action be maintained under the Federal Act. It was held that this was not the commencement of a new action for the purpose of complying with the two years' limitation prescribed by the statute. There is also an instructive note in connection with the case.

In the case of *Wabash Railroad Co. v. Hayes,* 58 L. Ed. (U. S.), 1226, the Court said:

> "The plaintiff asserted only one right to recover for the injury, and in the nature of things he could have but one. Whether it arose under the Federal

Act or under the State law, it was equally cognizable in the State court; and had it been presented in an alternative way in separate counts, one containing and another omitting the allegation that the injury occurred in interstate commerce, the propriety of proceeding to a judgment under the latter count, after it appeared that the first could not be sustained, doubtless would have been freely conceded. Certainly, nothing in the Federal Act would have been in the way.

"Instead of presenting his case in an alternative way, the plaintiff so stated it as to indicate that he was claiming only under the Federal Act. And when the proofs demonstrated that the injury arose outside of interstate commerce, and therefore that no recovery could be had under the Federal Act, the Court was confronted with the question whether the declaration could be amended, or regarded as amended, to conform to the proofs. Holding that this could be done, the Court treated the mistaken allegation that the injury occurred in interstate commerce as eliminated. Therein the Court merely gave effect to a rule of local practice, the application of which was not in anywise in contravention of the Federal Act. See Second Employer's Liability Cases (*Mondou v. New York, N. H. and H. R. Co.*), 223 U. S., 56, 57; 56 L. Ed., 348, 349; 38 L. R. A. (N. S.), 44; 32 Sup. Ct. Rep., 169; 1. N. C. C. A., 375."

ARGUMENT OF SEVERAL EXCEPTIONS.

[NOTE.—The references in this brief are to the marginal pages of the record.]

The attention of the Court is called to the fact that the plaintiff in error has brought forward in its assignments of error for the consideration of this Court every exception which it carried to the Supreme Court of North Carolina. A number of these exceptions were abandoned by the plaintiff in error in the hearing of the case in the Supreme Court of

North Carolina. Rule No. 34 of the Supreme Court of North Carolina provides as follows: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." In the brief of the plaintiff in error filed by it in the Supreme Court of North Carolina the following exceptions in the record of the said Supreme Court were not set out, nor was there in said brief any reason or argument stated, or any authority cited, in support thereof, to wit: Exceptions Nos. 4, 5, 8, 16, 20, 21, 26, and 30.

The defendant in error insists upon, and does not waive, its rights arising under the said abandonment, and therefore in his brief in this Court he will argue only those assignments of error growing out of exceptions which were not abandoned in the Supreme Court of North Carolina.

Exception 1, Page 18.

There is no force in this exception. The full answer of the witness and the context shows that he was testifying about the facts and not about his opinion.

Exceptions 2 and 3, Page 21.

The matters here inquired of were not such as required the testimony of an expert, in the ordinary sense of the word; but they only called for observation and experience about such matters, and it was in evidence that the defendant in error, who was testifying, had had ten years of such observation and experience and he was testifying, not upon a hypothetical state of affairs only, but about his actual knowledge and observation of the facts existing at the time he was injured.

Exceptions 6 and 7, Page 30.

There would be no force in these exceptions even if the plaintiff in error had not limited their application. The witness was testifying to a matter directly within his knowledge

and which was actually observed by him. But the plaintiff in error limited its objection to the alleged ground that "there is no allegation of such negligence in the complaint." An examination of the complaint reveals that this position is utterly untenable. The allegation there fully covers this state of facts, and no bill of particulars was requested by the defendant.

We call attention to the fact that this witness was not passing an opinion upon the question of the negligence of the plaintiff in error, which the jury was to try, but he was only testifying as to one isolated fact that he had observed—that the pumper had neglected—that is to say, failed—to stop his pump when the tank was full. This is a very common use of the word "neglect" among the people generally, and the Judge below evidently recognized this as being the meaning of his answer to the question which was asked by the Court itself.

In the case of *H. Hackfield, etc., vs. United States,* 197 U. S., 442, it is held that whether the use of the term "neglect" is intended to express carelessnes or lack of attention required by the circumstances, *or to express merely a failure to do a given thing,* depends upon the connection in which the term is used and on the meaning intended to be expressed.

Besides, this was just one little incident in a protracted trial and manifestly could not have caused injury to the plaintiff in error.

Moreover, particular attention is called to the fact that the plaintiff in error specified that its objection was that "there is no allegation of such negligence in the complaint." This eliminated all other objections, if any such there were, and this objection has no force whatever, for the allegation of negligence in the complaint did fully cover this matter.

In any event, this testimony was non-expert testimony, or opinion evidence, at most, and this Court and all the courts have been permitting that sort of testimony for quite a good

many years now. See, for example, *Burney v. Allen,* 127 N. C., 476; *Wilkinson v. Dunbar,* 149 N. C., at p. 27.

Bouvier's Law Dictionary (3d Ed.) defines "neglect" as follows:

"To omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty or act."

Citing *Rosenplaenter v. Roessle,* 54 N. Y., 262.

Where a party states the ground of his objection to evidence below, he cannot rely upon a different ground in this Court. This is well settled.

Ludwick v. Penny, 73 S. E., 228, syllabus 8; 158 N. C., 104.
Kidder v. McIlhenny, 81 N. C., 123.
Jones v. Call, 93 N. C., 179.

The ground of an objection urged below cannot be changed on appeal.

Kidder v. McIlhenny, 81 N. C., 123.

One objecting, on the trial of an action below, to the admission of evidence, but assigning an insufficient reason, cannot, on appeal, assign a different reason.

Rollins v. Henry, 78 N. C., 342.

When a party states his ground of objection to the admissibility of evidence upon the trial, his exception on appeal to the Supreme Court will be confined to the ground upon which he has based it.

Ludwick v. Penny, 158 N. C., 104.

PLAINTIFF IN ERROR WAS NEGLIGENT, AND DEFENDANT IN ERROR DID NOT ASSUME THE RISK.

Exceptions 9, 10, 11, 12, 13, 15 and 17, Pages 37-44 and 86.

The ice cases which hold that there is no negligence, or that the risk of danger is assumed, are those where the ice in question has been formed by weather conditions, or nature's operations only, and without the interposition of negligence on the part of the defendant or its employees. Of course, many cases can be found where on this question a plaintiff would not be entitled to recover, but this law is not at all applicable where the ice in question has been caused to exist by reason of willfulness or negligence on the part of some person. The latter is our case. The ice in question which caused the defendant in error's hurt was not the result of snow or sleet or rain, or any ordinary downpour of water or other ordinary happening. It was a place where ice was not usually found, and it was caused by the utter carelessness and negligence of the pumper, and the section foreman, and the section hands, and the work train crew, who all had knowledge of the existence of the dangerous place and ample means and opportunity to remove the danger, and utterly failed to remove it or safeguard it in any way whatsoever.

There have not been many adjudicated railroad cases about injuries from ice. Attention is called to the fact that those that have arisen have come from cold climates, where ice is to be expected. The defendant in error's injury occurred at a place where there is not much ice and snow ordinarily, and at a place where no one testified that he had ever seen ice before, and at a place where the defendant in error expressly testified that in all his years of experience he had never seen any before. By the general coldness, the defendant in error

was of course prepared to expect to find snow around generally over the surface of the earth at Cochran, but he had no reason to expect such a sheet of ice as caused his fall.

In the case of *Fitzgeral v. Connecticut River Paper Company,* 155 Mass., 155; 29 N. E., 464; 31 Am. St. Rep., 537, it was held that a servant by entering an employment necessitating the use of steps does not assume the risk of an injury by reason of their subsequent icy condition, where, when the contract was made, the steps were not icy, nor was there reason to suppose that the business involved a risk in regard to them.

The case at bar is not one where it is contended at all that the railroad should keep the ground near its tracks generally free from ice and snow. The cases relating to such matters are not in point, nor would cases referring to sleet formed by nature's unaided operations be in point.

For convenience, reference is made to the following railroad cases dealing with injuries caused by ice:

Gibson v. Iowa Central Railway Company, 131 N. W., 1057. In this case a brakeman was struck by a bank of snow near the track. The Court says: "The general rule is that a railway company is not liable to its employees for injuries resulting from climatic conditions, such as ice and snow; but within its yard limits it must exercise a degre of care commensurate with the risks to prevent the accumulation of snow and ice in such quantity, form and location as to be a menace to the safety of employees working in its yards."

Rifley v. Minn., etc., R. Co., 75 N. W., 704. This was the case where an employee was injured by a ridge of ice between the tracks. The Court held that it was a question for the jury.

Lawson v. Truesdale, 60 Minn., 410. Here a brakeman was struck by a snowbank near the track. It was held to be a question for the jury.

A large line of authorities pertinent to the case at bar may

be found in the cases dealing with the liability of municipal corporations for injuries occurring to pedestrians using sidewalks and streets. Here the rule is, that while the cities are not liable for injuries caused solely by nature's unaided happenings, yet where there is an interposition of human negligence which the city by the exercise of reasonable care could have prevented, the municipality is held liable, and the rule is the same as to the duty of railroad companies toward their employees. The city must exercise ordinary care to make and keep the sidewalks reasonably safe, and the railroad must exercise ordinary care to make the place of work of its employees reasonably safe. We cite some authorities along this line, but scores of others may be found to the same effect.

Darling v. Mayor et al. of New York, 25 N. Y. (Supreme Court), 340, was an action brought to recover damages sustained by the plaintiff by reason of his slipping upon some ice while passing along a sidewalk in the city of New York. The ice was formed by the freezing of water running from a conductor which emptied its contents close to a house, the water running thence across the sidewalk to the gutter, and it had been accustomed to form this way for some time. The night was dark and the ice was covered by a light fall of snow: *Held,* that the question of defendant's negligence should have been submitted to the jury.

The Supreme Court of Misouri, in the case of *Reedy v. St. Louis Brewing Co.,* 161 Mo., 523; 61 S. W., 589; 53 L. R. A., 805, held that where smooth and slippery ice covered a sidewalk for a space of 15 feet, which formed from water running off the roof of an abutting building on account of a leak in a water pipe therein, constitutes a dangerous obstacle, which the city is bound to remove within a reasonable time after notice, and defendant's negligence is a question for a jury.

The defendant was held liable for an injury sustained by falling on ice, in the case of *City of Muncey v. Hey,* 164 Mo.,

570; 74 N. E., 250, upon the ground that the defendant city had allowed a depression to remain in the walkway into which the water fell from abutting buildings and allowed to freeze therein. It was held that it was negligence to create a condition that would cause the accumulation and formation of ice on the sidewalk. Quite a number of authorities are cited to support the decision. Also see *McGowan v. Boston,* 170 Mass., 384; 49 N. E., 633.

The Supreme Court of Massachusetts, in the case of *Olson v. Worcester,* 142 Mass., 536; 8 N. E., held that where there are known causes in operation likely to produce a defect in a way, the diligence required by the officers of a town or city in watching the way and guarding against defects is greater than might be sufficient under other circumstances; and where, therefore, a defect is produced by some known cause, as by a water conductor upon a building adjacent to a sidewalk which empties its waters upon a sidewalk, causing the formation and accumulation of ice, renders defendant liable.

The Supreme Court of Pennsylvania, in the case of *Decker v. City of Scranton,* 151 Pa. State, 241; 25 Atlantic, 36, uses this language: "The ground of complaint in these (exceptions) is, that the Court declined to charge the jury that the city was not liable unless the ice had accumulated in hills and ridges as to form an obvious physical obstruction to travel, and that the city had notice of the same. The points in question are predicated upon the principle that a municipality is not liable for injuries resulting from the general slipperiness of its streets caused by the ice formed from the rain and snow falling upon them, but they entirely ignored the defective condition of the roadway and the evidence showing that the ice upon it was formed from the water which the city negligently permitted to flow there from the broken hydrant." . . . "He (the Judge) also instructed them that there was not such an accumulation of ice from *natural* causes, from

results of an ordinary storm, or from the thawing and freezing that goes on in winter, as the city was bound to remove. In these instructions the city obtained all that it was legally entitled to." *Defendant held liable.*

The Supreme Court of New York, in *Corbett v. City of Troy,* 6 N. Y. S., 381, where plaintiff sued for injuries resulting from a fall caused by ice on a sidewalk formed from the overflow of a leaking hydrant on the other side of the street, and where the testimony was conflicting as to whether the temperature was such that the ice would have been there for any length of time, held: "That, though the ice may have existed but a few days, the city was liable in *allowing an escape of water* which would inevitably cause ice when the weather was cold." The Court uses this language: "The hydrant is shown to have been leaking during the winter; and, although that ice may have existed but a few days, yet the jury might have been justified in finding negligence in the city in permitting an escape of water upon the sidewalk which would inevitably cause ice as soon as the weather became cold. *This is not a case where the ice came from what one called natural causes, such as the freezing of rain or sleet.*"

"There is no duty resting on the city to remove snow and ice from the sidewalks so long as the snow and ice *remain unchanged by the interference of man,* or from other artificial causes by which the snow or ice become ridged, uneven, or *is made to assume some other form or to present some other danger than it would have presented solely from natural causes.*"

Finane v. City of Perry, 145 N. W., at bottom first column, p. 498.

"The rule is not limited to the snow and ice becoming ridged, rounded or uneven, but *the city is charged with the*

duty when the snow and ice is made to assume some other form or present some other danger than it would otherwise solely from natural causes."

Griffin v. City of Marion, 144 N. W., mid. first col., p. 1015.
Holbert v. Philadelphia, 70 Atlantic, 746.

City held liable where ice was formed from a broken main.
Town of Belleville v. England, 118 S. W., 994.

A city is liable where it negligently permits an accumulation of smooth ice on its thoroughfares to the same extent as if the ice had formed in ridges. And it is liable where the ice was not caused by snow or rain, but by water flowing from a saloon and negligently permitted to continue to do so.

Magaha v. City of Hagerstown, 51 A., 832; 95 Md., 62; 93 Am. St. Rep., 317.

A city is liable for an injury caused by an accumulation of snow and ice which it negligently *permits to remain* in its street.

Haight v. City of Elmira, 59 N. Y. S., 193; 42 App. Div., 391.

Leaving a sidewalk in such condition from the accumulation of snow and ice as to be dangerous, *after actual notice of the danger* and the lapse of sufficient time to make it safe, is negligence on the part of the city.

City of Virginia v. Plummer, 65 Ill. App., 419.

In *Greenlaw v. Milliken,* 62 Atlantic Rep., 145; 100 Me., 440, it was held that the plaintiff could recover if the icy condition of the sidewalk resulted from water artificially conducted to the sidewalk and not from surface water naturally flowing there or from melting snow which had fallen there.

Where a person without his fault is injured by falling on ice which had accumulated in an alley, *which ice was not produced by rain or snow,* but by water escaping from the water mains of the city, which ran under the street and was frozen and became a dangerous obstruction in the street, and had existed for some time, the city was liable for the injury.

City of Cincinnati v. Grebner, 25 Ohio Cir. Ct. R., 700.

In an action against a city for personal injuries caused by ice on the sidewalk the Court should have instructed that, *if the ice was produced by artificial causes,* was dangerous to pedestrians, and the city had notice thereof, or should have had notice, in time to have removed it before the accident, it would be liable.

Hofacre v. City of Monticello, 103 N. W., 488; 128 Iowa, 239.

Where a water-works company floods the streets of a city and makes them unsafe by reason of the water freezing, the city is liable for allowing the ice so formed to remain longer than a reasonable time.

Waltermeyer v. Kansas City, 71 Mo. App., 354.

Where a city caused snow to be shoveled off one of its crossways and drain on an iron grating at the corner which was designed to carry off the water from the street, but which became clogged, so that the water flowed on the sidewalk, where it froze, and plaintiff slipped thereon, the act of the city was the cause of the injury.

Bishop v. Village of Goshen, 120 N. Y., 337.

Where the city authorities fail to clean out a gutter which they know to be obstructed, and in consequence the water

from melting snow flows upon the sidewalk and freezes there, the city is liable to a person injured by slipping on the ice thus formed.

Gaylord v. City of New Brittain, 58 Conn., 398; 20 Atl., 365; 8 L. R. A., 752.

In the case of *Gillrie v. City of Lockport,* 122 N. Y., 403; 25 N. E., 357, it appeared that the flow of water along a gutter was in some measure checked by a broken gutter stone, so as to allow ice to form on the sidewalk, the defendant was held responsible; the Court used this language: "This case does not come within the rule established in *Muller v. City of Newburgh,* . . . because the dangerous condition of the sidewalk was not due to *natural* causes, but *rather artificial ones,* and thus the finding of the jury that the defendant was negligent comes within the protection of *Todd v. City of Troy,* 61 N. Y., 506."

Exception 18, Page 86.

The ice which caused the plaintiff's injury was directly caused by the negligence of the plaintiff in error through pumper Lewis, in causing the overflow of the tank, and then through said Lewis and section foreman Parks and his hands and the work train's crew in not removing the ice or its dangerous smoothness.

There had never before been at this point any ice thus formed. The fact that there was ice elsewhere, caused by nature only, did not annul the negligence of the plaintiff in error in causing this particular ice which occasioned the defendant in error's hurt.

Exception 19, Page 87.

The defendant in error had no reason to expect the existence of ice of this character. It was not a risk ordinarily incident to his employment. There had never been ice at that

place before. He was unable to discover its presence by the ordinary exercise of his powers. It was not so apparent that a man of ordinary prudence would avoid it. Lewis and Park both undertook, like the defendant in error, to cross it. The defendant in error did not assume such a risk, and the instruction requested was properly refused.

Exception 22, Page 87.

This proposition of law in the general statement here requested to be given is not sound.

Exception 23, Page 88.

The Court substantially complied with this request and charged the jury that all the doctors testified that there was no permanent injury (page 108 of the record). He also charged them directly that there was no evidence of any permanent injury (page 109), and the plaintiff in error even excepts to this (Exception 34, page 109). The Judge was not obliged to give this instruction in the words asked.

Exceptions 24, 25 and 27, Pages 92, 93, 95.

The plaintiff in error's objection here is based upon a mere play on words. Ordinary care would necessarily produce only reasonable safety and not absolute safety of conditions. The context shows that this statement was modified as much as could be required. The Judge charged the jury that the employer is not a guarantor of the safety of the place of work.

This language of his Honor was quoted *verbatim* from the opinion of the Supreme Court of the United States in *S. A. L. Ry. v Horton*, 233 U. S., at the bottom of p. 501 and the top of p. 502. And it is a fair statement of the law, anyway. "Safe," as it was used, means as safe as the law requires, or having the quality of safety.

Exceptions 28 and 29, Page 96.

The allegations of the complaint fully warranted the con-

tentions here referred to. If they had not, it was the duty of the plaintiff in error to then and there call this to the attention of the Court. The language here complained of when read with its entire context is manifestly not eroneous. The Judge does not charge as to any contentions of the defendant in error, except "as I have recited them," to use his words.

Exception 31, Page 99.

The plaintiff in error's only objection to this sentence is that it omits reference to risks ordinarily incident to the service. The Judge can't say everything in one sentence, and in the context of this sentence, and especially in a later portion of his charge, he fully charged the jury as to the assumption of risks ordinarily incident to the employment.

Exception 32, Page 104.

This is so manifestly a strained interpretation of the language used as to require no argument to meet it. Manifestly the language, "inability to perform labor or capacity to earn money," is a parenthetical expression, explanatory of the immediate preceding words, "indemnity for the loss of time."

Exception 33, Page 107.

This is a fair and corerct statement of the law.

All the other exceptions mentioned in the plaintiff in error's brief are discussed in the first part of the defendant in error's brief.

CONCLUSION.

The Federal Employer's Liability Act was enacted for the purpose of protecting the rights of employees and giving them a better opportunity of recovering damages for injuries sustained. This Court should be, and has been, liberal in its construction of the act and in supervising the procedure thereunder, to the end that the purpose of its enactment may be

accomplished. If the contentions of the plaintiff in error and the course pursued by it in this litigation are to find favor with this Court, then a law intended to benefit injured employees will be turned into a weapon for their destruction. The trend of the times for a hundred years has been away from technicalities in pleading and procedure. Surely this Court will not turn backward the hands of time and make it more difficult for an employee to obtain relief by reason of this enactment than would otherwise have been his condition when he was only required to set forth a "plain and concise statement of the facts constituting his cause of action," and when his pleadings would be liberally construed and amendments thereto liberally allowed. There should be a presumption that employees injured by railroads engaged in interstate commerce have brought their actions under the Federal Employer's Liability Act, which is the supreme act, superseding, annulling and destroying all special acts, unless such employee in bringing his action specially pleads that he sues under some special or local act, or other act of less importance and dignity than the Federal Act.

We respectfully submit that the record in this cause discloses the fact that the defendant in error was injured by the negligence of the plaintiff in error; that his cause was properly submitted to the jury under correct instructions by the trial Judge; that the jury, after hearing the evidence and argument of counsel, awarded the defendant in error a reasonable amount for his injuries, and that no reversible error appears in the record, and the opinion and judgment rendered by the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

WILLIAM C. DOUGLASS,
CLYDE A. DOUGLASS,
ROBERT N. SIMMS,
Counsel for Defendant in Error.

Raleigh, N. C.

SEABOARD AIR LINE RAILWAY *v.* RENN.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 773. Argued April 4, 1916.—Decided May 22, 1916.

Whether the state court, in permitting an amendment to the complaint in an action under the Employers' Liability Act, disregarded the provision in § 6 limiting the time to commence actions under the Act, is a Federal question, although the allowance of the amendment otherwise might rest in the discretion of the court and be a matter of local procedure.

An amendment which merely expands or amplifies what was alleged in support of the cause of action asserted in the original complaint relates back to the commencement of the action and is not affected by the intervening lapse of time.

An amendment which introduces a new or different cause of action is the equivalent of a new suit which would be barred by § 6 if made more than two years after the cause of action arose.

Although the original complaint in this case may not have distinctly shown that the cause of action arose under the Employers' Liability Act still as it did not allege that the cause of action arose under the law of the State where it occurred, and did allege that defendant was engaged in operating its railroad in that and other States, *held* that an amendment that plaintiff's employment and defendant's engagement were both in interstate commerce at the time of the

injury did not amount to the statement of a new cause of action, but merely amplified or expanded that already stated and related back to the commencement of the suit.

Both courts below having concurred against defendant's request for instruction that there was no evidence of actionable negligence and there being no clear error this court will not disturb such conclusions.

Where the charge as a whole was fair, objections made at the time, but which did not specifically draw the attention of the trial court to inaccuracies in portions of the charge respecting the measure of damages, cannot, where not dealt with by the appellate court, be pressed in this court.

86 S. E. Rep. 964, affirmed.

THE facts, which involve the validity of a verdict and judgment for damages for personal injuries in an action under the Employers' Liability Act, are stated in the opinion.

Mr. Murray Allen for plaintiff in error:

Plaintiff was at the time of his injury employed in interstate commerce and his complaint states a cause of action under the statute of North Carolina defining the liability of a railroad to its employés, and also under the common law.

The complaint does not state a cause of action under the Federal statute.

That the carrier was engaged in interstate commerce and the employé was employed in such commerce at the time of the injury are essential allegations.

The court will look only to pleadings to determine the basis of plaintiff's cause of action.

The cause of action created by the Federal statute is separate and distinct from the cause arising under the common law.

The plaintiff had the selection of the basis of his action.

The court had no power to allow an amendment stating for the first time a cause of action under the Federal act

after the expiration of the period fixed by the act for the commencement of such action.

The amendment allowed by the court states a new cause of action, which is barred by the expiration of the period of limitation fixed by the act creating the right of action.

State courts accept *Union Pacific R. R.* v. *Wyler*, 158 U. S. 285, as controlling and refuse to permit amendments stating a cause of action under the Federal act after the expiration of two years.

The points of difference in an action based upon the common law and the statute of North Carolina and an action based upon the Federal Employers' Liability Act are material.

The facts showing the injury sustained by plaintiff do not of themselves constitute a cause of action.

There is not sufficient evidence of negligence in this case to be submitted to the jury.

Plaintiff assumed the risk of injury from slipping on ice around the water tank.

Mr. Robert N. Simms and *Mr. Wm. C. Douglass*, with whom *Mr. Clyde A. Douglass* was on the brief, for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court.

This was an action by an employé of a railroad company to recover from the latter for personal injuries suffered through its negligence. The plaintiff had a verdict and judgment under the Employers' Liability Act of Congress, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, the judgment was affirmed, 86 S. E. Rep. 964, and the defendant brings the case here.

The original complaint was exceedingly brief and did

not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. During the trial the defendant sought some advantage from this and the court, over the defendant's objection, permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in such commerce. Both parties conceded that what was alleged in the amendment was true in fact and conformed to the proofs, and that point has since been treated as settled. The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in § 6 that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." Whether in what was done this restriction was in effect disregarded is a Federal question and subject to reëxamination here, however much the allowance of the amendment otherwise might have rested in discretion or been a matter of local procedure. *Atlantic Coast Line* v. *Burnette*, 239 U. S. 199. If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action and was not affected by the intervening lapse of time. *Texas and Pacific Ry.* v. *Cox*, 145 U. S. 593, 603–604; *Atlantic and Pacific R. R.* v. *Laird*, 164 U. S. 393; *Hutchinson* v. *Otis*, 190 U. S. 552, 555; *Missouri, Kansas & Texas Ry.* v. *Wulf*, 226 U. S. 570, 576; *Crotty* v. *Chicago Great Western Ry.*, 95 C. C. A. 91; *S. C.*, 169 Fed. Rep. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running

of the limitation was not theretofore arrested. *Sicard* v. *Davis*, 6 Pet. 124, 140; *Union Pacific Ry.* v. *Wyler*, 158 U. S. 285; *United States* v. *Dalcour*, 203 U. S. 408, 423. The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina and elsewhere, that the plaintiff was in its employ, that when he was injured he was in the line of duty and was proceeding to get aboard one of the defendant's trains, and that the injury was sustained at Cochran, Virginia, through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina when the causal negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter State was at least consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in States other than Virginia was superfluous if the right of action arose under the laws of that State, and was pertinent only if it arose in interstate commerce, and therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was before the limitation had expired.

Error is assigned upon a refusal to instruct the jury, as matter of law, that there was no evidence of actionable negligence on the part of the defendant, and that the evidence conclusively established an assumption by the plaintiff of the risk resulting in his injury. Both courts, trial and appellate, held against the defendant upon these

points. They involve an appreciation of all the evidence and the inferences which admissibly might be drawn therefrom; and it suffices to say that we find no such clear or certain error as would justify disturbing the concurring conclusions of the two courts upon these questions. *Great Northern Ry.* v. *Knapp*, 240 U. S. 464; *Baugham* v. *New York &c. Ry.* (decided this day, *ante*, p. 237).

Complaint also is made of the instructions given upon the measure of damages. The criticism is directed against mere fragments of this part of the charge, and the objections made at the time were not such as were calculated to draw the trial court's attention to the particular complaint now urged. The inaccuracies were not grave and the charge as a whole was calculated to give the jury a fair understanding of the subject. The defendant therefore is not in a position to press the complaint, especially as it was not dealt with in the opinion of the appellate court. See *Magniac* v. *Thompson*, 7 Pet. 348, 390; *McDermott* v. *Severe*, 202 U. S. 600, 610; *Illinois Central R. R.* v. *Skaggs*, 240 U. S. 66.

Judgment affirmed.